NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM REPORT 107

NEW APPROACHES TO COMPENSATION FOR RESIDENTIAL TAKINGS

HIGHWAY RESEARCH BOARD
NATIONAL RESEARCH COUNCIL
NATIONAL ACADEMY OF SCIENCES–NATIONAL ACADEMY OF ENGINEERING

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NEW APPROACHES TO COMPENSATION FOR RESIDENTIAL TAKINGS

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NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

Systematic, well-designed research provides the most effective approach to the solution of many problems facing highway administrators and engineers. Often, highway problems are of local interest and can best be studied by highway departments individually or in cooperation with their state universities and others. However, the accelerating growth of highway transportation develops increasingly complex problems of wide interest to highway authorities These problems are best studied through a coordinated program of cooperative research.

In recognition to these needs, the highway administrators of the American Association of State Highway Officials initiated in 1962 an objective national highway research program employing modern scientific techniques. This program is supported on a continuing basis by funds from participating member states of the Association and it receives the full cooperation and support of the Federal Highway Administration, United States Department of Transportation

The Highway Research Board of the National Academy of Sciences-National Research Council was requested by the Association to administer the research program because of the Board's recognized objectivity and understanding of modern research practices. The Board is uniquely suited for this purpose as· it maintains an extensive committee structure from which authoritieson any highway transportation subject may be drawn, it possesses avenues of communications and cooperation with federal, state, and local governmental agencies, universities, and industry; its relationship to its parent organization, the National Academy of Sciences, a private, nonprofit institution, is an insurance of objectvity, it maintains a full-time research correlation staff of specialists in highway transportation matters to bring the findings of research directly to those who are in a position to use them.

The program is developed on the basis of research needs identified by chief administrators of the highway departments and by committees of AASHO Each year, specific areas of research needs to be included in the program are proposed to the Academy and the Board by the American Association of State Highway Officials. Research projects to fulfill these needs are defined by the Board, and qualified research agencies are selected from those that have submitted proposals. Administration and surveillance of research contracts are responsibilities of the Academy and its Highway Research Board.

The needs for highway research are many, and the National Cooperative Highway Research Program can make significant contributions to the solution of highway transportation problems of mutual concern to many responsible groups. The program, however, is intended to complement rather than to substitute for or duplicate other highway research programs.

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This report was prepared by the contracting research agency. It has been reviewed by the appropriate Advisory Panel for clarity, documentation, and fulfillment of the contract It has been accepted by the Highway Research Board and published in the interest of effective dissemination of findings and their application in the formulation of policies, procedures, and practices in the subject problem area

The opinions and conclusions expressed or implied in these reports are those of the research agencies that performed the research They are not necessarily those of the Highway Research Board, the National Academy of Sciences, the Federal Highway Administration, the American Association of State Highway Officials, nor of the individual states participating in the Program

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FOREWORD

By Staff

Highway Research Board

Serious practical problems arise when highway construction unavoidably necessitates the displacement of residential housing units, both in urban and rural areas. This report discusses and considers new approaches that can be applied to deal with the compensation and relocation problem of displaced individuals and families. Right-of-way engineers and agents, relocation specialists, attorneys, appraisers, and other personnel engaged in the acquisition of property for highway purposes will find much of interest in the new compensation approaches discussed in this report.

Assuring fully equitable compensation and providing total relocation services for displaced residents is being viewed more and more as the moral and legal responsibility of public agencies. However, the full scope of this responsibility has not been defined, nor have alternatives for meeting this responsibility been adequately studied and evaluated. Significant legal and valuation problems must be solved for administrators to adopt new guidelines and new methods for improving the property acquisition and relocation assistance process.

This report contains discussions of the constitutional requirements and limitations and how the basic standards for the payment of compensation to persons whose property is taken for public use are derived from such sources. There is growing dissatisfaction with the rules of compensation in eminent domain. This has led many federal, state, and local agencies to seek ways in which their payment for land acquisitions could ease dissatisfaction on the part of the recipient. If governments desire to increase the level of compensation, no legal impediment seems to stand in their way. Congress clearly has the power to compensate for losses and damages beyond those usually included in the traditional interpretation of "just compensation." Furthermore, Supreme Court cases indicate that "just compensation" is a variable term, and that, in some cases, money payments beyond the traditional "market value" may be within the scope of the Fifth Amendment mandate.

The research attorneys, Fred P. Bosselman, Michael D. Newsom, and Clifford L. Weaver, of the Chicago law firm of Ross, Hardies, O'Keefe, Babcock, McDugald and Parsons, discuss and analyze the need for new compensation techniques. Traditionally, "consequential damages" resulting from the taking of a man's property have not been paid by the acquiring agency because such damages have been considered part of the burden of citizenship. The rapid increase of residential takings has caused great pressure on government to pay more of these consequential damages. The various monetary and nonmonetary effects are outlined to indicate the wide range of losses that may result when residences are taken.

The principal thrust of the report is to suggest methods for assessing the advantages and disadvantages of alternative techniques of compensation, and attempts are made to answer the following questions: Which losses to the individual really deserve compensation? Which techniques would effectively compensate for such losses? What beneficial or detrimental by-products can be expected from the use of each technique?

Top highway administrators are urged to review this short report and evaluate it in terms of the needs of their own land acquisition and residential relocation process. Right-of-way engineers, relocation specialists, attorneys and appraisers should be encouraged to study carefully and put to use the research findings and recommendations of this project. They are the ones who can bring about the adoption of new approaches to compensating families and individuals when their homes must be taken for public use.

CONTENTS

ACKNOWLEDGMENTS

The research reported herein was performed under NCHRP Project 11-1(10) by the Chicago law firm of Ross, Hardies, O'Keefe, Babcock, McDugald & Parsons, Chicago, Ill., with Fred P. Bosselman as Principal Investigator. The authors, Messrs. Bosselman, Michael D. Newsom, and Clifford L Weaver, are attorneys with the firm

NEW APPROACHES TO COMPENSATION FOR RESIDENTIAL TAKINGS

SUMMARY

This report is directed at the problems that arise when highway construction requires displacement of residential units—problems of the compensation and relocation of the individuals and families displaced. These problems have been viewed more and more as the responsibility of public agencies, but as yet the full scope of this responsibility has not been defined, nor have methods for meeting the responsibility been adequately studied and evaluated. This report describes various methods of dealing with the problem and recommends ways in which these methods may be studied and evaluated.

The underlying premise of this report is that compensation to those displaced by a public project may be increased without increasing the over-all demand on the public treasury for highway dollars. In the Federal-Aid Highway Act of 1968, Congress recognized that dollars spent in avoiding dissatisfaction may be more efficient than dollars spent in dealing with the effects of that dissatisfaction. When there is opposition to a proposed highway the costs of that highway will be higher than if there were no opposition. It will cost money to fight the battles, to cope with the delays, to counter the ill will directed at the highway and at those who will build it. If more effective means of avoiding and compensating private losses associated with highway projects are developed and used, such means may well pay for themselves many times over by reducing opposition to the proposed highway.

A review of current legal authority reveals no substantial impediments that might thwart legislative or judicial attempts to employ new means of compensation to persons dislocated by highway projects. Because new compensation techniques are legally permissible, it is important to analyze and test various possible techniques to determine what impact they would have.

The analysis begins by classifying the various losses resulting from residential takings and by considering how these losses are treated under current compensation practices. The next step in the analysis is to catalog new compensation techniques that have been suggested or tried on an experimental basis.

Having determined the possible losses and the potential techniques of compensation, the analysis must determine: (1) as a policy matter, which losses should be compensated, (2) which compensation methods would appear to be directed toward the selected losses, and (3) what beneficial or detrimental effects might result from the use of each of the various techniques.

The analyst may then conclude that certain new compensation techniques appear to be promising methods for dealing with particular losses that should be compensated. The next step is to test these various compensation methods to determine their over-all impact. It is recommended that state highway departments use a portion of the research funds provided under the Federal-Aid Highway Act

to test these compensation techniques. Some of these tests might take the form of simulations in which computers would be used to measure the predicted costs and benefits of various types of compensation methods. Other studies might take the form of actual experiments in which a new compensation technique would be tried on a specific highway project, with the economic and social effects carefully measured and analyzed.

Thus, for example, a state might designate a certain portion of an urban highway project as a test area for an experimental compensation program. In this area a new compensation method might be used.

Among the compensation methods that should be considered for experimentation are:

1. New standards for valuing real property.
2. New methods of paying for "consequential" losses.
3. Centralized administration of relocation programs.
4. New ways of scheduling acquisition programs.
5. Revision in appraisal and negotiation practices.
6. Moving homes.
7. Buying existing homes for relocation purposes.
8. Constructing new housing.

These are discussed in "Over-All Impact of Various Compensation Techniques" in Chapter Six.

In summary, the main conclusion of this report is that a wide variety of changes in compensation techniques would be permissible under the present system of laws. Some of these changes may be helpful not only to the affected citizens but also to the taxpayer and to the expeditious progress of the highway program. More attention needs to be paid to testing these possible alternatives if these benefits are to be realized.

CHAPTER ONE

CONSTITUTIONAL REQUIREMENTS AND LIMITATIONS

CONSTITUTIONAL PROVISIONS

The basic standards for the payment of compensation to persons whose property is taken for public use are derived from constitutional sources. The Fifth Amendment of the United States Constitution states:

> Nor shall any persons . . be deprived of . . property, without due process of law, nor shall private property be taken for public use, without just compensation . . .

All but two states (North Carolina and New Hampshire) have similar constitutional provisions, and in those states the principle is well-established by statute or case law. In addition, the due process provision of the Fourteenth Amendment makes the Fifth Amendment guarantee applicable to the acquisition of property by the states.[1]

JUDICIAL DEVELOPMENT OF THE CONSTITUTIONAL CONCEPT

The typical constitutional provision involves four separate components: (1) property, (2) taking, (3) public use, and (4) just compensation. A quick review of these components provides preparation for a discussion of the various techniques that are available

Property

Compensation need not be paid for anything that is not "property." The property component of the concept has never been comprehensively defined by the United States Supreme Court. The Court has, however, said of the concept· [2]

> It is conceivable that [the term property] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. *When the sovereign exercises the power of eminent domain, it deals with what lawyers term the individual's "interest" in the thing in question . The Constitutional provision [Fifth Amendment] is addressed to every sort of interest the citizen may possess*

Generally, the term property as used in the constitutional provision is treated as a term of general classification and is liberally construed, with determinations of what constitutes "property" generally based on the local law of each state [3] However, many rights that might be thought of as "property interests" are not always considered such For example, rights to light and air from adjoining real estate can arise only from actual grant, and, therefore, in the absence of such grant, compensation based on the existence of said rights cannot be recovered.[4]

Taking

The second component, the "taking" notion, has been defined with similar breadth to reflect the needs of modern society. The low-flying-airplane case [5] is perhaps the best-known example. But this development began much earlier In 1872 the New Hampshire Supreme Court discarded the inflexible physical approach to the concept of taking, saying [6]

> The constitutional prohibition . . . has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read,—"No person shall be divested of the formal title to property without compensation, but he may, without compensation, be deprived of all that makes the title valuable " To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "an exclusive appropriation," "a total assumption of possession," "a complete ouster," an absolute or total conversion of the entire property, "a taking the property altogether." These views seem to us to be founded on a misconception of the meaning of the term "property".

Beginning at about the same time, the United States Supreme Court held in a series of cases that flooding of property constituted a "taking," even though neither title nor possession nor use was directly appropriated; permanent or recurring physical invasion that materially impaired the usefulness of the property was sufficient.[7]

Public Use

The third component of the public taking concept, public use, has been increasingly relaxed by judicial decision; the United States Supreme Court has said· [8]

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well nigh conclusive. . . . This principle admits of no exception merely because the power of eminent domain is involved
>
> * * *
>
> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled

Just Compensation

Despite their willingness and ability to expand the foregoing concepts to avoid imposing disproportionate burdens on the few citizens most directly affected by public projects, courts have been much more hesitant to break new ground when dealing with the "just compensation" phrase in constitutional provisions.[9]

In *Monongahela Nav. Co. v United States,*[10] the Supreme Court laid down the rule that the Fifth Amendment requires payment only for property that is taken, and that the compensation paid is for the property and not to the owner The compensation required has been defined in terms of "market value," which is the cash price that would be agreed on at a voluntary sale between an owner willing but not obligated to sell and a purchaser willing but not obligated to buy, taking into consideration all of the uses to which the property is adapted and might be put, and the demand for such use in the reasonably immediate future.[11] Excluded from the required compensation are any incidental losses or expenses incurred by property owners or tenants as a result of the taking of real property.[12]

FACTORS NECESSITATING A REVISION OF THE RULES OF "JUST COMPENSATION"

Although these rules of eminent domain law have been established for many years it is only in the comparatively recent past that a number of factors have converged to highlight their inadequacy.

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[1] The state and federal constitution provisions are collected in STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS, pp 169–93 (House Select Subcomm on Real Property Acquisition, 88th Cong , 2d Sess , 1964)

[2] United States v General Motors Corp , 323 U S 373, 377–78 (1945) (emphasis supplied)

[3] *See* 2 NICHOLS, THE LAW OF EMINENT DOMAIN § 5 1[1] (3d ed 1963) [hereinafter cited as NICHOLS]

[4] 2 *id* § 5 72[1]

[5] United States v Causby, 328 U S 256 (1946)

[6] Eaton v B C & M R R , 51 N H 504, 12 Am Rep 147 (1872)

[7] Pumpelly v Greenbay Co , 80 U S (13 Wall) 166 (1871), United States v Lynah, 188 U S 445 (1903), United States v Cress, 243 U S 316 (1917), *see also* Spies and McCoid, *Recovery of Consequential Damages in Eminent Domain,* 48 VA L REV 437, 445–46 (1962)

[8] Berman v Parker, 348 U S 26, 32–33 (1954), *see also* 2 NICHOLS § 7 2

[9] Pinsky, *Relocation Payments in Urban Renewal More Just Compensation,* 11 N Y L F 80, 81 (1965)

[10] 148 U S 312 (1893)

[11] Olson v United States, 292 U S 246, 255 (1934), *see also* STUDY OF COMPENSATION AND ASSISTANCE, *supra* note 1, at 59–67

[12] *See* STUDY OF COMPENSATION AND ASSISTANCE, supra note 1, at 54–55, RELOCATION ASSISTANCE UNDER CHAPTER FIVE OF THE 1968 FEDERAL AID HIGHWAY ACT 2 (NCHRP Research Results Digest No 3, Mar 1969); ADVISORY COMMISSION ON INTER-GOVERNMENTAL RELATIONS (ACIR), RELOCATION UNEQUAL TREATMENT OF PEOPLE AND BUSINESS DISPLACED BY GOVERNMENTS (Jan 1965)

The first is the great increase in land acquisitions at all levels of government. Where once a few homes were taken for a courthouse, now vast tracts of densely populated urban land are taken in federally aided urban renewal, defense, and highway programs.[13] State and local acquisitions also have grown with the expansion of state and local government programs.

Second, where formerly there was an ample supply of unused land for a few displaced persons, now there is often a critical housing shortage for vast numbers. Furthermore, the difficulties implicit in such a situation are compounded by the fact that very often the mass demolition occurs in those sections of the cities populated by the elderly, the poor, and the minority groups—those elements of society that are least able to withstand the noncompensated costs of being displaced.[14] In addition, as these people are displaced, they naturally compete with others in the same groups for the remaining supply of low-cost housing, so that the displacement at once reduces the supply and increases the demand for such housing.

Finally, in striking comparison to these developments in the sphere of public acquisitions is the ever-increasing role of government in assuring minimum standards of welfare, housing, education, and employment for all groups in the population.[15] These "rising expectations" encourage complaints about hardships that were formerly felt to be inevitable.

This growing dissatisfaction with the rules of compensation in eminent domain has led many federal, state and local agencies to seek ways in which their payments for land acquisitions could ease dissatisfaction on the part of the recipients.

CHAPTER TWO

THE POWER TO PROVIDE SUPPLEMENTARY COMPENSATION

MONEY COMPENSATION

If governments desire to increase the level of compensation in eminent domain, no legal impediment seems to stand in the way Congress clearly has the power to compensate losses and damages beyond those usually included in the traditional interpretation of "just compensation." For example, in *Mitchell v. United States*[16] the United States Supreme Court held that compensation for business losses was not necessary under the constitutional test of just compensation, but went on to say: [17]

> To recover, [plaintiffs] must show some statutory right conferred. States have not infrequently directed the payment of compensation in similar situations. . . . *Joslin Mfg Co v. Providence,* 262 U.S 668. Congress had, of course, the power to make like provision here.

In *Joslin*[18] the Court had rejected a Fourteenth Amendment challenge to state legislation authorizing the payment of certain consequential damages in connection with the acquisition of land as a water source. The Court said: [19]

> In respect of the contention that the statute extends the right to recover compensation so as to include . . . consequential damages and thus deprives plaintiffs in error, as taxpayers of the city, of their property without due process of law, we need say no more than that, while the legislature was powerless to diminish the Constitutional measure of just compensation, we are aware of no rule which stands in the way of an extension of it, within the limits of equity and justice, so as to include rights otherwise excluded. As stated . . in *Earle v. Commonwealth,* 180 Mass. 579, 583, . . . through Mr. Justice Holmes . . . : "Very likely the . . . rights were of a kind that might have been damaged, if not destroyed, without the constitutional necessity of compensation But some latitude is allowed to the legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law."

In its *Study of Compensation and Assistance for Persons Affected by Real Property Acquisition in Federally Assisted Programs*[20] the Select Subcommittee on Real Property Acquisition noted that it had found no decision denying the power of a legislature to pay damages over and above those constitutionally required to be paid to persons displaced by public programs.

Furthermore, two Supreme Court cases indicate that "just compensation" is a variable term, and that in some cases money payments beyond traditional "market value" may be within the scope of the Fifth Amendment mandate. In *United States v. General Motors Corp.*[21] and *Kimball Laundry Co. v. United States,*[22] the Court held evidence concerning removal expenses and evidence concerning loss of trade routes admissible on the question of the fair market value of the property interests taken. Both cases involved temporary takings. The Court apparently felt that

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[13] STUDY OF COMPENSATION AND ASSISTANCE, *supra* note 1, at 10–18.
[14] *Id* at 21–22 and 106.
[15] *See* ACIR, RELOCATION UNEQUAL TREATMENT, *supra* note 12, at 5–6, and *Hearings on Uniform Relocation Assistance and Land Acquisition Policies Act of 1969 Before the Senate Subcommittee on Intergovernmental Relations,* 91st Cong , 1st Sess., statement of R G Van Dusen, at 198–99 (Feb 19, 20, 25, 26, and 27, 1969)
[16] 267 U S. 341 (1925)
[17] *Id* at 345–46
[18] 262 U S 668 (1923).
[19] *Id* at 676–77
[20] STUDY OF COMPENSATION AND ASSISTANCE, *supra* note 1, at 90
[21] 323 U S 373 (1945)
[22] 338 U S 1 (1949).

this imposed special hardships on the condemnees, which justified the inclusion of consequential damages in the just compensation award.

In *General Motors* the government took only part of the term of a lease so that the tenant was faced with the necessity of moving out and then moving back in again at the expiration of the government use. The Court held that fair value was that amount that a hypothetical long-term tenant would require to lease the premises for temporary use; the cost of moving out, of storing goods pending sale, and of returning the property to the premises were held appropriate items to consider in determining that value.

In *Kimball Laundry* the United States took a laundry plant for use during World War II, thus forcing the laundry company to suspend its operation. The company sought recovery for the loss of its "trade routes"; i.e., for the loss of going-concern value. Again, the Court allowed recovery, saying: [23]

> The temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him. It is a difference in degree wide enough to require a difference in result.

In both of these cases the Court took some pains to point out that it was talking only about temporary takings and that the rule it was laying down did not apply where the government acquires the entire estate. However, in attempting to distinguish the latter cases, the Court talked as though there was some more basic difference underlying its distinction. In *Kimball* it said: [24]

> [T]he denial of compensation in . . the usual taking of fee title to business property . . . rests on a very concrete justification· the going-concern value has not been taken. [In such cases] . . . only the physical property has been condemned, leaving the owner free to move his business to a new location . . . . It is true that there may be loss to the owner because of the difficulty of finding other premises suitably situated. . . . But such value as the good will retains, the owner keeps. . . . In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may justifiably be excluded. . . . By an extension of that reasoning the same result has been reached even upon the assumption that no other premises whatever were available.

The Court then went on to discuss the condemnation of public utility property, which it said was a different matter because a utility could be operated profitably only as a monopoly so that the condemnee could not hope to earn a profitable return by duplicating the condemned facilities: [25]

> The rationale of the public utility cases, as opposed to those in which circumstances have brought about a diminution of going-concern value although the owner remained free to transfer it, must therefore be that an exercise of the power of eminent domain which has the inevitable effect of depriving the owner of the going-concern value of his business is a compensable "taking" of property. . . . If such a deprivation has occurred, the going-concern value of the business is at the government's disposal whether or not it chooses to avail itself of it.

In a later footnote, the Court said: [26]

> The line drawn . . . is . . . based on a recognition of a difference in the degree of restriction of the condemnee's opportunity to adjust himself to the taking.

If these latter pronouncements do reflect an underlying rationale more sophisticated than the "degree of taking" notion, then the courts themselves, without any legislative action, could begin to compensate for consequential damages in eminent domain proceedings where the circumstances justified it. But whether the line is drawn in terms of the degree of taking or on the basis of the "degree of restriction of the condemnee's opportunity to adjust himself to the taking," it is at least clear from these cases that the Court recognizes that the term "just compensation" does not have a single, fixed constitutional meaning in all circumstances, so that the legislature can be allowed some discretion in fixing its scope to deal with specific situations.

Special State Constitutional Problems

Although there seems to be little problem with supplementary compensation under the federal Constitution, state constitutional provisions must also be considered because they arguably could present problems in some states. State attempts to authorize relocation payments to public utilities whose facilities were displaced by highway construction are instructive in this regard. The Federal-Aid Highway Act of 1956 provides that the federal government will pay to the state a percentage of expenditures for public utility relocation if the state expenditures are not contrary to state law.[27] State enabling legislation since 1956 has been challenged in the courts on numerous occasions.[28] The types of constitutional provisions on which public utility relocation payment legislation has foundered are (1) constitutional provisions prohibiting pledging of a state's credit to private individuals and corporations, and (2) constitutional anti-diversion provisions for state highway funds.

The great majority of state courts have, however, found relocation payments valid under such state constitutional provisions. Perhaps the most telling argument in support of this conclusion is one based on the public interest of each state in not depriving its citizens of benefits available under federal programs to citizens of other states. This consideration seemed to have strongly influenced the Minnesota court in upholding utility relocation payments.[29] It quoted with approval the following language from *Department of Highways v. Pennsylvania Pub. Util. Comm.*· [30]

[23] *Id* at 15
[24] *Id.* at 11–12.
[25] *Id* at 13
[26] *Id* at 15, n. 6.
[27] 23 U S C § 123 (1958).
[28] *See, e g*, Edge v Brice, 113 N W 2d 755 (Iowa 1962), State Highway Dep't v. Delaware Power and Light Co, 167 A 2d 27 (Del. 1961), State v. Idaho Power Co., 81 Idaho 47, 346 P 2d 596 (1959), Opinion of the Justices, 152 Me 49, 132 A 2d 440 (1957) (advisory opinion), Minneapolis Gas Co. v Zimmerman, 253 Minn 164, 91 N W 2d 642 (1958); Jones v. Burns, 357 P.2d 22 (Mont. 1960), Opinion of the Justices, 101 N H. 527, 132 A 2d 613 (1957) (advisory opinion concerning a bill which was not enacted into law); State v Lavender, 69 N M 220, 365 P 2d 652 (1961), Northwestern Bell Tel. Co v Wentz, 103 N W.2d 245 (N D. 1960); State v Southern Bell T. & T Co., 204 Tenn 207, 319 S W.2d 90 (1958), *cert denied*, 359 U.S. 1011 (1959), State v City of Boston, 160 Tex 348, 331 S W 2d 737; State Road Comm'n of Utah v Utah Power & Light Co, 10 Utah 2d 33, 353 P.2d 171 (1960), Washington State Highway Comm'n v. Pacific N W. Tel., 367 P 2d 605 (Wash 1961)
[29] Minneapolis Gas Co v. Zimmerman, 253 Minn 164, 91 N W 2d 642 (1958).
[30] 185 Pa Super 1, 136 A.2d 473 (1957)

". . . Thus, if state A receives from the federal government 90% of the cost of other utility relocations on Interstate highways because the policy of that state is to bear this cost, while state B receives nothing from the federal government for utility relocations because its policy is not to bear this cost, the citizens of state B will pay on their utility bills for utility relocations in their state, and will also pay in their federal gasoline tax for a part of the cost of relocating utilities in state A."

Possible Taxpayer Challenges to Supplementary Compensation

Federal and state constitutional provisions requiring that expenditures of public monies be for "public purposes" or for "the general welfare" might also form the basis for a challenge to expenditures beyond "just compensation." Such a challenge probably would take the form of a taxpayer's suit to enjoin expenditures in excess of "just compensation" for property actually taken. The possibility of such a challenge involves two primary issues First, there is the question of whether a taxpayer has standing to sue to enjoin government expenditures. Second, there is the question of whether expenditures in excess of "just compensation" are for a valid "public purpose" or for "the general welfare "

Most states have long recognized that a state taxpayer has proper standing to institute legal proceedings to challenge a state action.[31] The standing of federal taxpayers to challenge federal expenditures for relocation assistance is less certain. Until recently, federal taxpayers had no standing to institute taxpayers' suits for injunctions against unlawful federal expenditures[32] However, in *Flast v. Cohen*[33] the United States Supreme Court held that federal taxpayers could sue to enjoin the distribution of federal funds to private religious schools The Court indicated that federal taxpayers may sue to enjoin federal expenditures that are in violation of specific constitutional limitations imposed on congressional spending powers. However, the Court also indicated that federal taxpayers' suits would not be entertained where the challenge was that "the enactment is generally beyond the powers delegated to Congress by Article 1, Section 8."[34] The most relevant specific constitutional limitation under which federal relocation expenditures might be challenged is the Fifth Amendment's "taking for public use" clause However, as indicated subsequently, the courts have increasingly held that legislative decisions under that clause will not be reviewed by the courts. On this basis it seems unlikely that the *Flast* rationale will be extended to grant federal taxpayer standing to challenge relocation payments

Taxpayer suits against state action have on occasion challenged public works projects[35] on the grounds that they were not for public purposes.[36] The success of such suits generally turns on whether the proposed expenditure could be classified as for a public purpose. Although courts initially took a rather narrow view of which public expenditures were for public purposes, the more modern approach generally treats expenditures made incident to public projects as expenditures for "public purposes." Again, the utility relocation payment cases are instructive. The majority of courts that have reviewed the question have upheld state relocation payments to utility companies required to relocate due to highway construction against challenges that such expenditures were not for public purposes.[37] Although the rationale of many of these cases is often based on the public benefit derived from the operation of the utility, some of the arguments used to sustain the "public purpose" of such payments would also apply to residential relocation payments and to the provision of alternative housing for those displaced by highways. For example, in *Minneapolis Gas Company v. Zimmerman,*[38] the court indicated that the mere existence of federal relocation payment legislation cloaked the state enabling legislation with a "public purpose " The court said. [39]

> The realities of the situation are that the people of Minnesota would suffer economically if the state failed to take advantage of Federal aid made available to the privately and municipally owned utilities . . under the Federal-Aid Highway Act of 1956 . . The Federal aid program is to be financed out of Federal funds, presumably resulting from Federal taxes contributed in part by the people of this state.

Lack of state legislation would result in a loss of revenue to the state. Presumably, federal expenditures on a matching basis for relocation payments or for the provision of alternative housing to those displaced by highways could also render state expenditures pursuant to such a program expenditures for a "public purpose "

But even apart from this somewhat novel theory, the liberalization of the "public purpose" concept will probably result in the recognition that provision of adequate replacement housing for those dislocated by a public highway is but one factor in planning for the highway program and, as such, constitutes a "public purpose." *Berman v. Parker*[40] is the clearest and strongest authority for the modern view of what is included within the concept of "public purpose." The issue raised in that case was whether safe and sanitary buildings could be condemned as part of a general urban renewal project. The Court held firmly that they could be and recognized that total comprehensive planning of an area was a public purpose. [41]

> It was important to redesign the whole area . . . It was believed that the piecemeal approach . would be only a palliative. The entire area needed redesigning so that a balanced, integrated plan could be developed

[31] *See, e g*, Ethington v *Wright,* 66 Ariz 382, 189 P 2d 209 (1948), Leckenly v Post Printing and Publishing Co, 65 Colo 443, 176 P 490 (1918), Ferges v. Russle, 270 Ill 304, 110 N E 130 (1915), Sears v Treasurer and Receiver General, 327 Mass 310, 98 N E 2d 621 (1951), Carrier v State Administrative Bd, 225 Mich 563, 196 N W. 184 (1923) (rehearing opinions), Lyon v Bateman, 119 Utah 434, 228 P 2d 818 (1951) *Contra,* Bull v Stickman, 273 App Div 311, 78 N.Y S 2d 279, *aff'd,* 298 N Y. 516, 80 N E 2d 661 (1948), Schieffelin v Komfort, 212 N Y 520, 106 N E 675 (1914), Asplund v Hannett, 31 N M 641, 259 P 1074 (1926)

[32] Frothingham v Mellon, 262 U S 447 (1923)

[33] 392 U S 98 (1968)

[34] *Id* at 103

[35] *See, e g*, Bleecker Luncheonette, Inc v Wagner, 141 N Y S 2d 293 (Sup Ct), *aff'd,* 289 App Div 828, 143 N Y S 2d 628 (1955)

[36] *See, e g*, Visina v Freeman, 252 Minn. 177, 89 N W 2d 638 (1958) (sustaining expenditure of public money for port facilities although such facilities were to be leased to private shippers)

[37] *See, e g*, State Highway Dep't v Delaware Power & Light Co, 167 A 2d 27 (Del 1961); Minneapolis Gas Co. v. Zimmerman, 91 N W 2d 642 (1958), Northwestern Bell Tel Co. v. Wentz, 103 N W 2d 245 (1960)

[38] 91 N W 2d 642 (1948).

[39] *Id* at 652

[40] 348 U S. 26 (1954)

[41] *Id* at 34–35

> for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. . . . Such diversification in future use is plainly relevant to the maintenance of the desired housing standards and therefore within congressional power

The opinion further indicates that the means to deal with public problems are solely within the discretion of the legislature. [42]

> Once the object is within the authority of Congress, the right [in this case, private enterprise] by which it will be attained is also for Congress to determine . [T]he means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established

On the basis of this modern view as to the scope of the public purpose and of the legislative discretion in choosing methods to realize it, it can be expected that state taxpayer suits to enjoin expenditures for relocation assistance will not be successful.

COMPENSATION IN KIND

Many techniques for compensation in highway takings would involve giving the affected people benefits in some form other than straight dollar payments. Conceding the power of the legislature to authorize money payments in excess of constitutional requirements, a question still remains as to its power to authorize compensation in some form other than cash. Once again, it would seem that there is no constitutional bar.

Brown v. United States [43] involved the creation of a reservoir by the United States government that would flood three-quarters of a nearby town. The government proposed to compensate displaced owners by condemning property for a new town site to which the flooded portion of the old town could be moved so as to be united with the remaining section. The owner of the proposed new site objected to the condemnation of his property. The Court upheld the condemnation proper, finding that compensation in kind was proper in this case: [44]

> It was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one.
>
> . The transaction is not properly described as the condemnation of the land of one private owner to sell it to another. . . . The real nature of what is done . . is . a mere transfer of the town from one place to another at the expense of the United States. The usual and ordinary method of condemnation . . . would be ill adapted to this exigency. It would be hard to fix a proper value of homes in a town thus to be destroyed without prospect of their owners' finding homes similarly situate on streets in another part of the same town or in another town near at hand. . . . A town is a business center. It is a unit. . . . A method of compensation by substitution would seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution.

The Court then cited *Pitznogle v. Western Maryland R.R Co.*[45] for the proposition that: [46]

> "[Where] the condemnation of . land . . . for a substitute private road or way is incident to and results from the taking, by reason of public necessity, of the existing private road for public use, and the use of it for such purposes should, we think, be regarded as a public use within the meaning of the Constitution."

The Court concluded its discussion of this problem by distinguishing an advisory opinion of the Justices of the Supreme Judicial Court of Massachusetts [47] which held it was not a public use to condemn lots abutting on both sides of a proposed street, with a view to selling them after the construction of the street for the promotion of the erection of commercial buildings. The Court said: [48]

> The distinction between that case and this is that here we find that the removal of the town is a necessary step in the public improvement itself and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation

A similar problem was before the Court seven years later in *Dohany v Rogers*,[49] a case involving the widening of a state highway, which necessitated condemning an adjacent railroad right-of-way The state proposed condemnation of adjoining land for the purpose of relocating the railroad right-of-way, and the owner challenged the taking as not for a public purpose. The Court disposed of the challenge briefly. [50]

> It is enough that although the land is to be used as a right of way for a railroad, its acquisition is so essentially a part of the project for improving a public highway as to be for a public use [Citing *Brown* and *Pitznogle*.]

A number of state decisions also have dealt with the problem. Nichols on *Eminent Domain* summarizes the law in this fashion: [51]

> Under certain extraordinary conditions the conventional method of compensating an owner whose property is taken by a proceeding in eminent domain by paying him the value thereof is completely inadequate. To do complete justice to such an owner and, what is even more important, to meet the practical problems which arise by reason of the taking, it becomes necessary to furnish such an owner with lands as a substitute for the lands which have been taken [i]s such secondary acquisition of property to be considered for a public use?
>
> The question has been answered in the affirmative not only in jurisdictions which subscribe to the liberal interpretation of "public use" but even in those where the narrow doctrine ordinarily prevails

Perhaps the most interesting state case for present purposes is *Watkins v Ughetta* [52] where the widening of a highway necessitated the removal of 48 one- and two-family residences at a time when there was a critical housing shortage. The condemnor undertook to condemn land located at some distance from the proposed expressway to relocate the 48 houses, the owners of the second site objected. The Court upheld the substitute condemnation, citing only *Brown*.

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[42] *Id* at 33
[43] 263 U S 78 (1923)
[44] *Id* at 81–83
[45] 119 Md 673 (1913)
[46] 263 U S at 83
[47] Opinion of Justices, 204 Mass. 607 Regarding the continuing validity of this opinion see note 176, *infra*
[48] Opinion of the Justices, *supra* note 47, at 84
[49] 281 U S 362 (1930)
[50] *Id* at 366
[51] 2 NICHOLS § 7 226 at 667–68
[52] 78 N Y S 2d 393, 297 N Y 1002, 80 N.E 2d 457 (1948)

Although the foregoing cases appear sufficient to save an exercise of substitute condemnation from attack by a taxpayer or the second condemnee, none has dealt with a challenge by a condemnee being asked to accept substitute compensation It seems certain that should the government attempt to compel a condemnee to accept compensation in a form other than cash, the property owner would have a valid Fifth Amendment claim. Such situations have on occasion come into the courts, sometimes evoking rather high prose in defense of the right to cash, as in the following excerpt from the 1795 case of *Van Horne's Lessee v. Dorrance.* [53]

> By the act [under review], the equivalent is to be in land. No just compensation can be made except in money. Money is a common standard, by comparison with which the value of anything may be ascertained. . . . Compensation is a recompense in value, a *quid pro quo,* and must be in money. True it is, that land or anything else may be a compensation, but then it must be at the election of the parties; it cannot be forced upon him.
>
> If this be the Legislature of a republican government, in which the preservation of property is made sacred by the constitution, I ask, wherein it differs from the mandate of an Asiatic prince? Omnipotence in Legislation is despotism. . . Wretched situation, precarious tenure! And yet we . . call ourselves free!

Nichols on *Eminent Domain* summarizes the case law of the states: [54]

> While the constitutions of the states do not ordinarily prescribe the medium by which compensation shall be paid, that the compensation must be in money is a qualification that has been read into the phrase . . . by all the courts in which the question has arisen.

Furthermore, as indicated in *Van Horne's Lessee v. Dorrance,*[55] an attempt by the legislature to prescribe compensation in terms other than cash entails the risk of running afoul of the rule that the ascertainment of the amount of compensation is a judicial and not a legislative function. In *United States v. New River Collieries* [56] the Court said: [57]

> The owner was entitled to the full money equivalent of the property taken. . . . The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard. *Monongahela Navigation Co. v. United States.*

However, this constitutional inability to require the condemnee to accept substituted compensation should present no practical difficulties for at least two somewhat related reasons In the first place, the purpose of attempting to provide alternate methods of compensation is not to force them on unwilling dislocatees but is rather to make them available to those dislocatees who need or desire something other than cash. And second, in those cases where substituted compensation might be thought the most proper remedy—where those displaced are elderly, poor, or from minority groups—relocation will undoubtedly be a more advantageous and desirable alternative from the condemnee's point of view than a cash payment of "just compensation." Thus, to the extent that the condemnor has any interest in using substituted, rather than cash, compensation, those interests and the interests of the condemnee should be fully compatible.

[53] 2 Dall. 304, 1 L. Ed. 391, 396–97 (1795) (decided on circuit)
[54] 3 NICHOLS § 8 2 at 17–18
[55] 2 Dall 304, 1 L. Ed 391 (1795).
[56] 262 U S 341 (1923)
[57] *Id* at 343–44.

CHAPTER THREE

THE NEED FOR NEW COMPENSATION TECHNIQUES

It has long been recognized that the taking of a man's property often causes him injury for which he is not compensated. These "consequential damages" have traditionally been considered part of the "burden of citizenship." [58] In a growingly urbanized society, however, the rapid increase in residential takings has caused great pressure on government to compensate more of these consequential damages.

Most of the call for increased compensation stems from the complaints of residential occupants whose homes are taken for highway or other puroses. To provide a framework for discussion of various compensation techniques this report attempts to outline the various losses that are frequently incurred as a result of the taking of residential property. This outline is not intended to be all-inclusive. It merely indicates the wide range of losses that may result when residences are taken.[59]

Moreover, no attempt has been made to list compensating benefits that may result from the construction of the highway. The removal of traffic from neighborhood streets and the improvement of access to jobs outside the city are only two examples of a wide range of benefits that a new highway may offer to inner-city neighborhoods. In the final analysis, all of the losses discussed here must be balanced against any such benefits received.

MONETARY LOSSES

Loss of Real Property

The most obvious of the losses imposed by the taking of residential property is, of course, the loss of the real property involved; it is this loss that has traditionally been compensated under the prevailing fair-market test of just compensation.

Losses Resulting from Being Displaced

Certain monetary losses can be expected to result from the mere fact of having one's property taken by the state. These are quite independent of any losses due to the necessity of finding and moving to replacement property.

Costs of Transferring the Property to the State

Several miscellaneous losses sometimes result from the necessity of transferring legal title to the real property to the state, such as recording fees, transfer taxes, penalty costs for prepayment of a mortgage, and pre-paid property taxes allocable to a period subsequent to transfer of title to the state.[60]

Loss of Equity in the Property Taken

Because a low-income buyer normally does not have the credit standing needed to obtain a normal mortgage loan, he is often forced to purchase his home "on contract" at a price far above its fair market value. The inflated price is considered compensation to the seller for accepting a very low down payment from a person who is a high credit risk. When property purchased on contract is condemned at fair market value, very often the contract purchaser loses any "contract purchase equity" he has built up; he is left with nothing but the possibility of a deficiency judgment after applying his award to the debt he still owes the seller.[61] Closely related to the loss of equity in the condemned property is the possible loss by the condemnee of owner status, owing to his inability to acquire and finance a new dwelling within his financial means after the condemnation.

Losses Due to Time Lag Between Announcement of the Project and the Taking

In most states the date at which fair market value is established is the date at which the condemnor first takes court action to purchase the property.[62] The project will of course have been announced long before this time. The owner may be the victim of at least three types of losses as a result of this delay between the announcement of the project and the actual taking.[63]

Losses Due to Forced Sale.—Should the owner be required for personal reasons to dispose of his property before the actual taking, but after the announcement of the project, it is very unlikely that he will be able to realize a reasonable price.

Losses of Rental Income.—If the property to be taken is income property, most tenants will no doubt begin moving out long before the actual taking, in an effort on their part to avoid the hardships of last-minute forced relocation. The owner may thus lose all of his rental income if he is unable to find new tenants, and will undoubtedly lose at least a portion of it in any event, because any new tenant will pay only the value of a "tenancy at the will of the condemnor."

Losses Due to Increased Rate of Deterioration.—As the exodus from the affected neighborhood begins to take place, it can be expected that the rate of deterioration of the property will increase due to increased vacancies and the vandalism that may spawn. Furthermore, those remaining in the area will have no incentive to keep up their property, so that a general deterioration of the surrounding area can be expected. All of this probably will be at the owner's expense, inasmuch as his property will not be valued until taken.[64]

Losses Resulting from the Necessity of Relocating

In addition to the foregoing losses resulting from the mere fact of the taking, the residents (who may or may not include the owner) will incur other losses because they must now find, acquire, and move to new housing

Moving Costs—Personal Property and Family

The most visible of the losses imposed by the necessity of relocating is the cost of the actual move. Where the move is of a substantial distance or where the replacement housing is not ready for occupancy when the move must be made, the displaced resident may incur costs for transportation, lodging, and meals for his family in addition to the costs of moving his personal property (which costs may include wear and tear).

Costs of Searching for Replacement Housing

Before the displaced resident can even think about moving costs, he must find a place to move. This may entail time lost from work or real estate finders' fees.

Incidental Costs of Acquiring Replacement Housing

The displaced resident incurs certain costs in obtaining substitute housing; these may include, when housing is purchased, costs of appraisal, survey, title examination, and closing costs. When housing is rented the costs may include security deposits for utility service and advance payments of rent. In addition, he may incur substantial costs in the form of increased charges to finance the replacement housing.

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[58] Spies and McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA L REV. 437 (1962).

[59] The taking of other types of property also causes a variety of losses which are not covered by traditional compensation techniques For discussion of these losses, *see* STUDY OF COMPENSATION AND ASSISTANCE, *supra* note 1, at 26–35

[60] *Id.* at 54

[61] *See* Riley v. District of Columbia Redevelopment Land Agency, 246 F 2d 641 D C Cir. 1957) and City of Chicago v. Robertson, 48 Ill App 2d 241, 198 N E.2d 192 (1964).

[62] *See* D. Glaves, *Date of Valuation in Eminent Domain Irreverence for Unconstitutional Practice*, 30 U. CHI L. REV. 319, 325–26 (1963).

[63] *See generally* STUDY OF COMPENSATION AND ASSISTANCE, *supra* n. 1.

[64] *See* D Glaves, *Date of Valuation in Eminent Domain. Irreverence for Unconstitutional Practice*, 30 U CHI L. REV. 319 (1963)

Increased Cost of Replacement Housing

Both owner and tenant face the problem of finding equivalent housing in a rising real estate market Many residential tenants receive bargain rates in a rising market because of long leases or merely because the landlord is hesitant to raise the rents of existing tenants to the level he would charge a new tenant This new-old tenant differential is a cost borne by the old tenant, who becomes a new tenant as a result of a taking

The displaced resident frequently finds that the compensation he received does not enable him to find a comparable replacement dwelling.[65] If the residential displacement occurs in one of the older areas of the city,[66] there will probably be little new low-cost housing available.[67] Older buildings, which provide the main supply of housing for low-income groups, will be in great demand, and will not appear on the market with great frequency, particularly if the highway project is significantly reducing the total supply of housing at a given price level.[68] Thus, the displaced resident may not be able to find comparable housing because of the tight market conditions

Costs Due to Loss of Employment and Increased Commuting Expenses

The displaced resident may suffer a loss of employment and income due to either the destruction and failure to relocate of his former place of employment or his inability to reach his former place of employment from his new residence. Similarly, his disposable income may be reduced if he must now pay increased commuting costs to his place of employment.[69]

NONMONETARY LOSSES

In addition to the economic losses just outlined, a displaced resident may suffer a variety of noneconomic losses

Disruption of Established Relationships

If the dislocatee is forced to relocate far from his former residence, he may suffer from the disruption of relationships built up in the old area. These are not merely the psychological upsets of moving away from family and friends, the disruption of business and credit relations with local merchants could conceivably work considerable hardship on low-income families.

Disruption of the Neighborhood

If the dislocatee can relocate close to his old residence, he may avoid some of the disruption of established relations, but he will be faced with other losses. A highway may have certain adverse effects on the area through which it runs Inadequate planning may make the highway unattractive and may also result in needless destruction of existing points of attraction in the community. Furthermore, it may bring increased traffic, noise, and pollution

The highway may also destroy schools, museums, parks, and similar education or recreational facilities. But even if these facilities are avoided in siting the right-of-way, access to them, and thus their value to the community, may be substantially impaired Finally, the highway may have destroyed a number of local businesses that either will not be able to recuperate from the condemnation at all or that will relocate outside the area. The area surrounding the highway may thus become a less convenient—and thus a less desirable—place to live.

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[65] *See* STUDY OF COMPENSATION AND ASSISTANCE, *supra* note 1, at 21–22, where it is reported that rental payments for housing among 789 displaced families jumped from $54 per month to $65 per month and from 19 7 percent of income to 23 7 percent of income on relocation *See also* KEY, WHEN PEOPLE ARE FORCED TO MOVE 85–87 (The Menninger Foundation, 1967) for another statistical study bearing out the fact that when people are forced to relocate, they most often find it necessary to devote more of their income to housing expense

[66] STUDY OF COMPENSATION AND ASSISTANCE, *supra* note 1, at 21–22 and 106 The report indicates that about 90 percent of all displacements are in urban areas and that most affect low- and moderate-income families

[67] LANSING ET AL , NEW HOMES AND POOR PEOPLE 5–9 (Inst for Social Research, Univ of Mich , 1969) reports that over 90 percent of all new housing studied was priced over $15,000 and that practically no new housing was priced under $10,000, on the other hand, the study found that 20 percent of existing housing was priced below $10,000 and 23 percent between $10,000 and $15,000

[68] *See* A Downs, "Uncompensated Non-Construction Costs Which Urban Highways and Urban Renewal Impose Upon Residential Households," in *Hearings on Urban Highways Before the Senate Subcomm on Roads*, 90th Cong , 2d Sess , Pt 2, at 313, 335–41 May 7, 1968)

[69] *Id* at 334–35

CHAPTER FOUR

CURRENT COMPENSATION PRACTICES

Traditional eminent domain theory provided compensation only for the cost of the land actually taken This rule has been expanded by the courts in certain special circumstances; state and federal statutes have also provided additional compensation for some of these losses

Significant steps toward "more just" compensation have been taken in Chapter 5 of the Federal-Aid Highway Act of 1968, which was enacted to "insure that a few individuals do not suffer disproportionate injuries as a result of Federal highway programs and the construction

of Federal-aid highways . . designed for the benefit of the public as a whole." [70] In this section, current practices relating to the compensation of the foregoing losses are briefly summarized.

COSTS OF TRANSFERRING PROPERTY TO THE STATE

The costs of transferring property to the state are now compensable under Chapter 5 of the Federal-Aid Highway Act of 1968.[71]

LOSS OF EQUITY IN CONDEMNED PROPERTY AND LOSS OF OWNER STATUS

Some effort to relieve the hardships of the contract purchaser was made by the District of Columbia Circuit Court in the celebrated *Mayme Riley* case,[72] which implied that contract sellers and holders of junior mortgages are entitled only to the realistic present value of their rights to future payments taking account of the credit risk.

However, few courts apply this separate valuation approach; nor does the 1968 Highway Act. It seems likely that many owner-occupants in low-income areas will be faced with the *Mayme Riley* problem. The replacement housing allowance of the Act is computed as the difference between the average price of comparable housing and the acquisition payment for the condemned property.[73] If the condemnee is compelled to use the whole acquisition payment to satisfy his debts to the contract-seller or mortgagee, then it is possible that the replacement housing allowance will be insufficient to allow him to acquire another dwelling (and thus he will not qualify for it at all), and he will again be relegated to the status of renter, despite his prior efforts and expenditures to become a homeowner.

LOSSES DUE TO TIME LAG BETWEEN ANNOUNCEMENT AND TAKING

Losses due to pre-taking deterioration, loss of rental income, and forced sale before taking are not compensated under either current eminent domain or supplementary legislation.

MOVING COSTS—PERSONAL PROPERTY AND FAMILY

Although moving costs are not included in traditional notions of just compensation, legislation has for some time provided some assistance on a piecemeal basis. As early as 1933, Congress authorized the Tennessee Valley Authority to provide assistance to persons displaced by TVA acquisitions. Some state legislatures also have responded to this loss either by authorizing administrative departments to pay compensation for moving or by legislative expansion of eminent domain statutes to authorize the acquiring agencies to award moving costs.[74] The 1968 Federal-Aid Highway Act has required payments for moving costs incurred through displacement caused by federal and federal-aid highways programs. Under the Act, persons displaced by such projects will receive either actual reasonable moving expenses or, at the option of the dislocatee, a moving expense allowance determined according to a fixed schedule not to exceed $200 plus a dislocation allowance of $100. The Act covers moving costs of both personal property and family.[75]

INCREASED COST OF REPLACEMENT HOUSING

Traditional just compensation notions do not take any account of the fact that the dislocatee may not be able to relocate himself in a comparable dwelling for the just compensation that he receives from the condemnation. Again, the 1968 Federal-Aid Highway Act has moved to fill a void by requiring state agencies to pay displaced owner-occupiers up to $5,000 in addition to the acquisition cost of the condemned property where that is necessary to secure a comparable dwelling that is determined to be decent, safe, sanitary, adequate to accommodate the displaced owner, reasonably accessible to public services, places of employment, and available on the private market Such payments are available only to displaced owners who actually purchase and occupy such a dwelling within one year.[76] The state agency also is required to make payments of up to $1,500 to any displaced renter if that is necessary to enable him to rent for a period not to exceed two years, or to make the down payment on the purchase of a decent, safe, and sanitary dwelling, adequate to accommodate the displaced family in an area not generally less desirable in regard to public utilities and public and commercial facilities.[77]

INCIDENTAL COSTS OF ACQUIRING REPLACEMENT HOUSING AND COSTS OF SEARCHING FOR REPLACEMENT HOUSING

Incidental costs of acquiring replacement housing and costs of searching for replacement housing are not covered by traditional compensation, nor have they been dealt with by supplementary legislation or by the 1968 Federal-Aid Highway Act Section 506, in providing for additional payments to secure replacement housing, computes the award as the difference between the average *price* of a comparable dwelling and the acquisition payment, taking no account of the incidental costs of acquiring the new property.[78] Although the fixed dislocation allowance of $100 provided for by the Act offsets such expenses, it is available only when the dislocatee elects to forego his actual reasonable moving expenses and accept the fixed moving allowance [79]

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[70] 23 U S C § 501
[71] 23 U S.C. § 507.
[72] *Riley v District of Columbia Redevelopment Land Agency*, 246 F 2d 641 (D.C Cir 1957)
[73] 23 U S C § 506
[74] ACIR, RELOCATION UNEQUAL TREATMENT, *supra* note 12, at 6–7 *See* Comment, *Compensation for Moving Expenses of Personal Property in Eminent Domain Proceedings*, 20 HASTINGS L J 749 (1969)
[75] 23 U S C § 505
[76] 23 U S C § 506(a)
[77] 23 U S C. § 506(b)
[78] 23 U S C § 506
[79] 23 U S C § 505(b)(2). For a discussion of these incidental costs see Comment, *The Interest in Rootedness. Family Relocation and an Approach to Full Indemnity*, 21 STAN L REV 801, 807–09 (1969)

LOSS OF EMPLOYMENT AND/OR INCREASED COMMUTING EXPENSES

The costs of loss of employment and/or increased commuting expenses are not currently compensated either under eminent domain law or by supplementary legislation.

NONMONETARY LOSSES

Nonmonetary losses are not currently compensated either under eminent domain law or by supplementary legislation. Some attempts to avoid these losses are being made through advance planning, advisory assistance programs, and joint development.

CHAPTER FIVE

METHODS OF COMPENSATING AND AVOIDING LOSSES

Having isolated the losses imposed by highway projects and the current practices concerning compensation for them, it is necessary to discuss the possible methods that could be employed to avoid or compensate these losses. For purposes of discussion, methods are organized as "monetary" and "nonmonetary."

MONETARY COMPENSATION

Three general approaches may be taken to the problem of distributing cash to those adversely affected by a highway project:

1. Eminent domain only
2. Eminent domain plus scheduled damages.
3. Eminent domain plus scheduled damages plus claims procedure.

Eminent Domain Only

The approach of distributing cash on the basis of eminent domain only seeks to compensate all losses in a single proceeding. Which losses are compensated turns on the formula used to define "just compensation." The traditional fair market value does not include compensation for any incidental losses.[80] The following is a summary of the most-discussed suggestions for revision of this formula; an assessment of their effects appears in Chapter Six of this report.

Highest Reasonable Price

This formula—"the highest price that the property could reasonably be expected to bring if exposed for sale in the open market for a reasonable time"—has been used by California and several other states in their statutory expansion of the eminent domain valuation concept.[81] This formulation alters the traditional approach only insofar as it emphasizes that the condemnee should be given the benefit of the doubt and awarded the highest price that falls within the range of reasonable prices.

Upset Price

In 1968, Maryland amended its eminent domain law to incorporate an "upset-price" concept into its definition of just compensation for owner-occupants of substandard housing.[82] The law requires that an owner-occupant shall receive, in addition to the fair market value of his property, a sum up to $5,000 if it is necessary to enable him to acquire decent, safe, and sanitary housing generally comparable to that being taken.

Following passage of this law in Maryland the Federal-Aid Highway Act of 1968 was amended to authorize 100-percent federal funding of payments up to $5,000 over the cost of owner-occupied dwellings when necessary to purchase safe and sanitary housing.[83] The Act, which contemplates use of a claims procedure, is discussed in "Increased Cost of Replacement Housing" in Chapter Four of this report.

Replacement Cost

For unique types of property having no readily determinable market value, such as churches and cemeteries, a traditional method of valuation has been used to determine the replacement cost of the property.[84] Recently, it has been suggested that housing in low-income areas is also a unique type of property that lacks a readily determinable market value, and should thus be valued using the replacement cost method.[85]

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[80] *See* "Loss of Real Property" in Chap Six of this report

[81] *See* STUDY OF COMPENSATION AND ASSISTANCE, *supra* note 1, at 127, and ACIR, RELOCATION: UNEQUAL TREATMENT, *supra* n 12, at 6–7 *Cf* J. Johnston Jr, *"Just Compensation" for Lessor and Lessee*, 22 VAND L REV 293–97 (1969)

[82] Md Senate Bill 365, Art 33A MD CODE ANNO § 6A (1957), effective June 1, 1968.

[83] 23 U S C § 506(a) See discussion *supra* note 76

[84] 4 NICHOLS § 12 32

[85] Allard, *Is Market Value Just Compensation?*, THE APPRAISAL J 355 (July 1967) *See* testimony of Clarence Mitchell in *Hearings on S 1 Before the U S Senate Subcomm on Intergovernmental Relations*, 91st Cong 1st Sess, at 111, 124 (Feb. 25, 1969)

Separate Valuation of Interests

The approach to condemnation valuation of separate valuation of interests cuts across all of those just discussed and is aimed at solving the problem dealt with in the *Mayme Riley* case of loss of equity in the condemned property. Under this approach public agencies would be authorized to purchase or to condemn notes and other evidence of debt at their market value, which would take account of the fact that immediate cash payment would remove the high-risk element of the investment and would give the creditor immediate cash rather than the right to a small monthly payment over a long term of years The difference between the fair market value of the note and the fair market value of the property would then be paid to the contract purchaser or mortgagee in recognition of his equity in the property.[86]

Eminent Domain plus Scheduled Damages

The approach of distributing cash on the basis of eminent domain plus scheduled damages differs fundamentally from the one of eminent domain only in that it employs two separate procedures for disbursing funds to those injured by the construction of a highway. In this case, the owner's loss of his real property would be compensated in an eminent-domain proceeding employing one of the alternative valuation formulas set out previously But, in addition, he would be entitled to compensation for certain incidental losses under a statutory scheme isolating certain major incidental losses and specifying the compensation available for each. This is generally the approach that has been taken in federal legislation, most recently in Chapter 5 of the 1968 Federal-Aid Highway Act [87]

Eminent Domain plus Scheduled Damages plus Claims Procedure

The approach of distributing cash on the basis of eminent domain plus scheduled damages plus claims procedure also would keep separate the compensation for the taking of the real property and the compensation for incidental losses occasioned by the taking; however, it does take an additional step by setting up a separate procedure to hear and decide claims for incidental losses allegedly sustained by the dislocatee that go beyond the statutory schedule This system would attempt to distinguish among claims in such a way that the most obvious claims would be compensated with the least possible delay and administrative cost, whereas the most unusual claims would require thorough and substantial supporting proofs before compensation would be allowed.

The claims procedure might allow the displacee to file a written claim with appropriate proofs—i.e., actual receipts—for any of the statutorily recognized incidental losses where his actual loss would exceed the scheduled damages, in addition, the condemnee would be allowed to file claims for incidental losses not specifically recognized by the statute and to negotiate these claims with the agency; finally, if the negotiations did not result in a settlement satisfactory to the condemnee, he would then be allowed at least a quasi-judicial hearing on his claim.

Professors Spies and McCoid of the University of Virginia suggest that at such a hearing the standard of proof the claimant must meet should be something more strict than "preponderance of the evidence," in order to avoid paying exaggerated or sham claims. They further suggest that the familiar "proximate cause" standard of negligence cases would be appropriate [88] These standards provide adequate starting points. However, it is necessary that enough flexibility be provided for adjustment of these standards by the awarding agency as it gained experience in the field.[89]

NONMONETARY COMPENSATION

The foregoing techniques deal only with how to award cash when that is the form the compensation takes; the following techniques are concerned with noncash compensation, either as an alternative to cash or as a supplement to it.

Techniques of nonmonetary compensation are aimed at one of two somewhat overlapping goals: first, they seek to minimize the losses imposed by a public taking by making the process more fair or more efficient; second, they seek to compensate for losses that cannot be avoided no matter how fair and efficient the taking process is. The following outline begins with techniques of "avoidance" and proceeds through techniques of "compensation." The relative merits of the following techniques are taken up later in this report.

Uniformity of Practice

One of the recommendations most often made for improving the relocation process is that uniformity be established as to relocation, advisory assistance, and payments available to persons displaced by various federal and state programs.[90] A major cause of dissatisfaction with current practice has been the inability of those displaced to understand why a family on one side of the street who is removed under the highway program is treated substantially differently from its neighbors across the street who are removed under an urban renewal program.[91]

[86] STUDY OF COMPENSATION AND ASSISTANCE, *supra* note 1 at 85–88, *see also* BUREAU OF PUBLIC ROADS, HIGHWAY CONDEMNATION LAW AND LITIGATION IN THE UNITED STATES 41–42 (1968)

[87] 23 U S.C. §§ 501 *et seq*

[88] Spies and McCoid, *Recovery of Consequential Damages in Eminent Domain*, 48 VA L REV 437, 455–56 1962)

[89] For logical completeness it may be noted that one could also approach the problem of cash compensation through an "eminent domain plus claims procedure" method or "claims procedure only" method However, neither of these is a practical alternative The latter might be unconstitutional if it imposed on the condemnee the entire burden of suing the condemning authority to recover even for the physical taking The "eminent domain plus claims procedure" method would be administratively expensive because it would have no scheduled damages provision to eliminate the vast majority of claims that are clearly and easily compensible The system might, however, be employed with advantage in a small-scale experiment for the purpose of seeing what losses are most felt by the dislocatees themselves and which, if any, are mainly fictions of the imagination of the schedule-compiler

[90] *See* S 1, 9st Cong , 1st Sess (1969).

[91] *See* ACIR, RELOCATION UNEQUAL TREATMENT, *supra* note 12, and *see generally Hearings on Uniform Relocation Assistance and Land Acquisition Policies Act of 1969 Before the Subcomm on Intergovernmental Relations*, 91st Cong , 1st Sess (1969)

Centralization of Relocation Facilities in One Agency to Handle All Dislocation in an Area

Proponents of a Uniform Relocation Act have recommended that federal, state, and local governments authorize all agencies causing displacements in a major urban area to centralize, through formal or informal agreements, the responsibility for determining the availability of relocation housing and the type and amounts of housing needed; for administering payments to displaced persons and businesses, and for providing counseling, information, and other assistance to such displacees. They also have recommended that such urban relocation agencies offer their services to all local governments and agencies operating in the area on a contract basis.[92]

The proposed act provides that state agencies receiving federal financial assistance may provide relocation assistance "by utilizing the facilities, personnel and services of any other state agency having an established organization for conducting relocation assistance programs" [93] The act urges federal agencies administering programs that may be of assistance to those displaced to cooperate with federal or state agencies causing displacement.[94] The act further authorizes the President

> to require any Federal agency to make relocation payments or provide relocation services by utilizing the facilities, personnel, and services of any other Federal agency, or by entering into appropriate contracts or agreements with any state agency leaving an established organization for conducting relocation assistance programs [95]

More Adequate Lead Time

It also has been argued that the surest cure for the evils of dislocation is simply more adequate advanced planning and allowance of adequate lead time. California's State Highway Engineer has said [96]

> It is our firm belief that the reason so many affected families [in California] can accomplish relocation on their own is that our acquisition process allows them ample time to do so Lead time is obviously the key to minimization of relocation problems
>
> * * *
>
> You can see that—*given adequate time to relocate*—we do not believe an owner or tenant suffers unusual hardships . [W]e would object to any further expansion of payment in the form of bonuses or incentives of any kind, all of which we consider to *be bribes to overcome the affected person's resistance to poor planning procedures which do not allow him adequate time to make his own arrangements.*

Advance Acquisition

Closely related to the provision of more lead time is the advance acquisition of highway rights-of-way. This device calls on the highway authority to anticipate its land needs in advance and to purchase right-of-way before rising land prices and improvements on the land inflate the right-of-way cost. Federal funds are now available for such acquisitions.[97]

A specialized form of advance acquisition is "hardship acquisition"—a device now employed by 44 states.[98] It has been defined as follows: [99]

> [The] acquirement [*sic*] of property for ultimate highway right-of-way purposes in order to relieve undue hardship on an owner because the announced highway improvement freezes the market, so to speak, so that he can no longer market his property at its reasonable value, because the owner cannot make substantial improvements to his property since he is not likely to fully recoup these added costs, because he cannot incumber it readily, or because of other influences that result in unreasonable difficulties for the owner in the exercise of his legal powers with respect to the property.

Holding Over

Another device for minimizing the hardships of dislocation is permitting the owner or tenant to "hold over"—to occupy the property at minimal rents for a short period after the state has acquired title to the property Most states will allow both tenants and owners a period of from 30 to 90 days of free occupancy in which to surrender and vacate the property Many states rent to both tenants and previous owners and establish a vacancy date that will allow sufficient time to clear the right-of-way in ample time to meet the construction schedule [100]

Two-Hearing Procedure

The Federal Highway Administration recently instituted a "two-hearing procedure" [101] for federal-aid highway projects. These regulations require state highway departments to hold a hearing *before* commitment to a specific corridor alternative to insure that an opportunity is afforded for effective participation by interested persons in the determination of the need for, and the location of, federal-aid highways.[102] At this hearing the highway department is required to consider the "social, economic and environmental effects" of proposed alternative locations.[103] The regulations list 23 separate items that are included in the concept of "social, economic and environmental effects." [104] The state highway department responsible for the hearings shall prepare a transcript of the hearings and make the same available for public inspection and copying [105] These regulations have stirred up a great deal of controversy.[106]

Local Appraisers

The Pittsburgh Urban Redevelopment Authority has announced an "equitable appraisal" program under which, in addition to the condemnor's appraisers (usually two), a

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[92] ACIR, Relocation Unequal Treatment, *supra* note 12, at 22–24, *see also* Groberg, Centralized Relocation A New Municipal Service (NAHRO, 1969)

[93] S 1, 91st Cong , 1st Sess § 231(d) (1969)

[94] *Id* § 212(b).

[95] *Id* § 241(c)

[96] Dept of Transportation, Highway Relocation Assistance Study 109 and 102 (90th Cong , 1st Sess , 1967) (emphasis in original)

[97] 23 U S C § 108 *See generally* Comment, *Problems of Advance Land Acquisition*, 52 Minn. L Rev 1175 1968)

[98] Dept of Transportation, Advanced Acquisition of Highway Rights-of-Way 6–7 (90th Cong , 1st Sess , 1966)

[99] *Id* at 20

[100] *Id* at 46

[101] Federal Highway Administration, Policy and Procedure Memorandum 20–8 (Transmittal 147, Jan 14, 1969), also reprinted at 34 Fed Reg 727 (Jan 17, 1969)

[102] *Id* Par 6a

[103] *Id* Par 9

[104] *Id* Par 4c

[105] *Id* Par 8c.

[106] *See Hearings on Proposed New Part 3 of 23 C F.R. Before the Dept of Transportation* (Wash , D C., Dec. 16–20, 1968).

"community appraiser" will prepare an appraisal at the expense of the agency It is thought that an appraiser familiar with local conditions may more accurately reflect the value of the property in light of peculiar local advantages it may have. The three appraisers will then attempt to work out their differences.[107]

A similar idea is found in a bill introduced in the United States Senate which provides: [108]

> The owner or its designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

These proposals reflect the strength of the movement for local involvement in decisions that affect inner-city neighborhoods.

Early Appraisal

Another modification of the current appraisal practice that has been proposed would be to fix the valuation date at the point in time when the likelihood of the acquisition has become so great that buyers and sellers of property would be likely to take it into account in valuing the property; under current practice, the earliest valuation date is normally the date when the condemnation petition is filed.[109]

Senate Bill 1 would require appraisal before the initiation of any negotiations in both federal programs and federally assisted programs.[110] In addition, the Bill provides, as to both federal and federally assisted programs, that: [111]

> Any decrease in the value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for the proposed public improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property.

Negotiation Practices

A final area where the fairness of the taking process might be increased is that of negotiation practices. Agencies acquiring property for federal and federally assisted programs select competent appraisers and then review the results of the appraisals to insure their completeness and accuracy and finally settle on the appraisal which, in the agency's best judgment, represents the fair market value of the property.[112] But then, despite this care taken to arrive at an accurate index of fair market value, it has been found that "[S]ome . . . agencies . . . offer approximately 75 percent of all owners less than the agency approved appraisals." [113] Some federal agencies were actually acquiring half their property at less than appraised value.[114]

The House Select Subcommittee on Real Property Acquisition has recommended that: [115]

> *Every property owner should be entitled to reasonable information concerning the agency's opinion of the value of his property, and he should be entitled to receive an offer for his property at the full amount of the agency's approved appraisal Any other practice in the situation where, in effect, the owner must sell is unfair.*
>
> Further, any other policy penalizes the uninformed owner as compared to the owner who is knowledgeable about property values, and it makes the amount of compensation more dependent upon the aggressiveness of the owner than on the value of his property
>
> *A general practice of "trading on each property" is undesirable and does not promote public confidence in Government land acquisition activities.*

Senate Bill 1 would require "a prompt offer to acquire the property for the full amount [which] the agency head believes to be just compensation, such amount not to be less than the appraised value of the property as approved by the agency head." [116]

An alternative method for removing the inequities of the bargaining process has been instituted by the Department of Housing and Urban Development, it consists of eliminating bargaining from the negotiation process altogether [117] Under this system the condemning authority makes one firm and final offer; if it is not accepted, the agency must bring condemnation proceedings immediately.

Advisory Assistance

The remaining techniques of nonmonetary compensation are directed less at preventing losses from ever arising and more at dealing with those losses that can be expected to occur no matter how efficient and fair the taking process can be made. Some of these losses may not be amenable to cash compensation but may nevertheless be taken off the shoulders of a few affected citizens and spread over the whole "public" if one or more of the following techniques of nonmonetary compensation is employed.

The first of these techniques is relocation advisory assistance, which all state highway departments must now begin to provide. The Federal-Aid Highway Act of 1962 required that procedures for such assistance be adopted by state highway departments.[118] The Federal-Aid Highway Act of 1968 repealed that provision and substituted a similar provision [119] which did not require full compliance until July 1, 1970, if local laws made immediate compliance impossible. It further provides that such assistance could be supplied through federal, state, or local governmental agencies to avoid duplication of functions.[120]

Some experience in the field of urban renewal indicates that relocation advisory assistance and associated relocation education programs can be a significant factor in ra-

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[107] Interviews with Mr William Farkas, Executive Director, Pittsburgh Urban Redevelopment Authority, and Mr Vincent St Johns, General Counsel, Pittsburgh Urban Redevelopment Authority (Jan 22, 1968)
[108] S 1, 91st Cong , 1st Sess , § 301(a)(3) (1969)
[109] Glaves, *supra* note 62, at 325–29
[110] S 1, 91st Cong , 1st Sess , § 301(a)(4) and § 321(a)(3) (1969)
[111] *Id* § 301(a)(4) and § 321(b) (3)
[112] STUDY OF COMPENSATION AND ASSISTANCE, *supra* note 1
[113] *Id* at 46
[114] Data compiled for this report showed that the initial offer made by state or local agencies acquiring property was below the agency's approved appraisal in as many as 57 percent of the cases, depending on the particular type of project involved The figures for federal agencies were much higher in general, running as high as 79 percent, depending on the particular federal agency involved The percentages of actual negotiated purchases below agency-approved rates were as high as 34 percent where states and localities were acquiring property and as high as 50 percent where federal agencies were involved *Id* at 47–48
[115] *Id* at 120 (emphasis in original)
[116] S 1, 91st Cong , 1st Sess , § 301(a)(4) and § 321(a)(3) (1969)
[117] Local Public Agency Letter No 449 (Feb 6, 1968)
[118] 23 U S C § 133
[119] 23 U S C § 508
[120] 23 U S C § 503

tional relocation decisions by displaced individuals and families.[121] Working out of local store-front offices or in mobile vans in the relocation area, advisory assistance teams seek to relocate families displaced and to soften the adverse impact of forced relocation. Such advisory assistance can include education about the housing market, family budgeting and moving procedure, listings of sale and rental properties, listing of public housing vacancies, assistance and advice on securing government assistance in home financing, certification of eligibility for low- or moderate-income housing, and referral services [122]

Providing Replacement Housing: Moving Existing Dwellings

In the process of acquiring a highway right-of-way, the condemning authority also acquires many dwellings that it ordinarily demolishes or sells. Proposals for relocation of such structures on vacant lots as homes for their prior residents have gained some support.[123] Senate Bill 1 would provide: [124]

> If the head of the Federal agency concerned does not require a building . . . acquired as a part of the real property, he shall where practicable offer to permit its owner to remove it As a condition of removal, an appropriate agreement shall be required whereby the fair value of such building . . for removal from the real property, as determined by such agency head, will be deducted from the compensation otherwise to be paid for the real property, however such compensation may be determined.

Some states authorize political subdivisions acquiring land for highway rights-of-way to condemn or otherwise acquire vacant land and relocate thereon and sell unnecessary structures acquired in right-of-way acquisition [125] Legislation recently proposed in Illinois would allow state agencies and other political subdivisions to acquire by condemnation, or otherwise, vacant land or land occupied by unsafe and dilapidated structures as replacement sites for structures acquired within expressway rights-of-way. Under the Illinois legislation the former owner of the relocated structure must be given the initial option to purchase the relocated structure.[126]

Providing Replacement Housing: Securing Existing Housing

Another method for providing replacement housing without actually constructing it would involve the highway authority in securing existing housing to be made available to dislocatees, or providing dislocatees with information concerning public and private housing currently available for purchase or rental. This might involve purchase or leasing of housing by the highway authority as it became available on the market before demolition on the right-of-way began, to ensure that a supply of replacement housing would be available as necessary Another possibility would be to give highway dislocatees preferential treatment on housing available through Veterans Administration (VA), Federal Housing Administration (FHA), and Federal National Mortgage Association (FNMA) mortgage foreclosures. This technique has been employed with some success by other agencies.[127] Public housing might also be made available to dislocatees on a preferential basis.

Short of actually acquiring existing housing to make it available to dislocatees, highway departments can take steps to ensure that dislocatees have access to information on available existing housing. This can be done by compiling lists of vacancies after checking newspaper and public notices, real estate agencies, large landlords, utility companies, and post offices. Some cities go beyond this and pay finders' fees to owners, brokers, and agents who list with their relocation departments [128]

Providing Replacement Housing: Construction New Housing— Public, Private, and Joint Development

A final method of compensating dislocatees through provision of replacement housing involves construction of new housing by public agencies or private developers. Such housing might be scattered over a large number of sites—either suburban or redeveloped urban—or concentrated in a few sites. Construction might be undertaken as a project completely separate from the highway or as part of the highway project under a "joint development" approach.[129]

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[121] DIST OF COLUMBIA REDEVELOPMENT LAND AGENCY, COMMUNITY SERVICES AND FAMILY RELOCATION (1964)

[122] ACIR, RELOCATION UNEQUAL TREATMENT, *supra* note 12, at 105; *see also* GROBERG, *supra* note 91, Franklin, *Expanding Relocation Responsibilities of Local Renewal Agencies*, 11 N Y.L F 51 (1965), and HUD News Feature No. 4648, Oct 7, 1967

[123] The constitutionality of substitute property as compensation is discussed in "Compensation in Kind" in Chap Two of this report.

[124] S 1, 91st Cong , 1st Sess , § 301(a)(7) (1969)

[125] *See, e g* , Ill Rev Stat. ch. 67½, §§ 103–106

[126] Ill 76th Gen Assem., House Bill 2416, *as amended* (1969)

[127] ACIR, RELOCATION: UNEQUAL TREATMENT, *supra* note 12, at 31 HUD Release, "HUD News" No 68–0186, Jan 9, 1968

[128] ACIR, RELOCATION· UNEQUAL TREATMENT, *supra* note 12, at 31

[129] *See* DEPT OF TRANSPORTATION, *supra* note 96, at 146

CHAPTER SIX

ANALYZING THE ALTERNATIVES

The primary function of this report is to suggest methods for assessing the advantages and disadvantages of alternative techniques of compensation. Before considering the various methods by which an assessment could be made it is important to review the underlying questions that must be asked in any assessment of alternative techniques.

First, which losses to the individual really deserve compensation, either by the public generally or by the highway-user public specifically? Second, which techniques would effectively compensate for which losses? Third, what beneficial or detrimental by-products can be expected from the use of each technique? [130]

WHICH LOSSES DESERVE COMPENSATION

At its most basic level the decision of whether or not to compensate a particular loss is a pure policy question, answerable only in terms of a decision by the legislature and electorate or by the courts. It is certainly appealing to argue that *every* loss caused by a highway should be compensated; however, this requires a determination of which losses are "caused" by the highway.

Another difficult question is whether the "public" that must share the loss should include only those who directly benefit by use of the facility or should include the public as a whole. Clearly, the highway-user public is benefitted by having the real estate on which to build its highway; but is it benefitted by the fact that the owner of the real property built a house on it? Rented the house? Built a porch on it? Made friends in the area? It becomes difficult to draw a line between compensation, which should be paid by the highway-user public, and social welfare payments, which should be borne by the public as a whole.

Analysis of these questions can begin by asking not whether the public has been benefitted, but whether the construction of the highway has caused an individual's loss. Initially, it might be suggested that if the loss would not have been incurred "but for" the highway, it should be compensated. However, the losses that could be causally linked to a highway on this test are infinite. A displaced resident might, for example, break his leg while moving his furniture. It would be universally agreed that not all such "but for" losses are appropriate for compensation [131] The law of torts, which governs compensation for injury in, for example, automobile accidents, draws the line in terms of "proximate cause," a nebulous concept based traditionally on whether a loss suffered by one person was the natural and probable consequence of what some other person did or whether that other person should have reasonably foreseen the possibility of that loss resulting from what he did.[132]

The chief difficulty with such a test is in applying it; in the majority of cases, the existence or nonexistence of proximate cause will be clear; but at the boundary the concept is quite vague, and it is, of course, at the boundary that the most difficult policy questions will arise.[133]

The common-law courts have neatly avoided this problem by defining the concept and then letting twelve peers of the parties decide in secret whether the test has been met. There is a need to build similar flexibility into any system of compensation because the possible combinations are infinite and no rule can hope to cover all of them squarely and at the same time hope to do justice. Thus, a first major goal of any compensation system should be to arrive at some definition of losses that are "too remote" to warrant compensation in light of the community's current notions of justice, and then to devise a method of applying that definition with a degree of flexibility commensurate with the complexity of the problem.[134]

Thus far, then, the analysis says only that certain losses will *not* be compensated because they are "too remote." It says nothing about which of the "not-too-remote" losses will be compensated. Before that question can be answered, it is necessary to have some agreement on what the purpose of the compensation is. To some extent this is another issue of policy that must be decided in light of the political demands of the day, and one may have to resort to purely subjective standards.

One obvious goal of any compensation program is to ensure that the highway is constructed as quickly and as

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[130] It would be impossible to discuss these questions without allowing the authors' own opinions to slip out occasionally. But the authors have tried to keep in mind that the function of the report is to suggest the questions that should be asked, not the ultimate answers that should be given

[131] *See* RESTATEMENT (SECOND) OF TORTS § 431 and *see* PROSSER, LAW OF TORTS § 41 (3d ed 1964) where it is said

> In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond "The fatal trespass done by Eve was cause of all our woe" But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation" As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy

[132] *See* RESTATEMENT (SECOND) OF TORTS § 435 and *see* PROSSER, *supra* note 131, § 41

[133] PROSSER, *supra* note 131, put it this way

> There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the proper approach Much of this confusion is due to the fact that no one problem is involved, but a number of different problems, which are not distinguished clearly, and that language appropriate to a discussion of one is carried over to cast a shadow upon the others

[134] A similar type of analysis is undertaken by those who seek to devise improved techniques of dealing with automobile accidents *See, e g*, R. KEETON & J O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM—A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

cheaply as possible so that the benefits of the highway will be realized as soon as possible at the lowest possible cost. One source of "cost" in building a highway is the opposition of those displaced by it As such opposition increases, delay increases; and, as delay increases, the cost to the public treasury increases. As Elmer Timby, the President of the Engineering Division of the American Road Builders Association, testified in 1967, "delays cause economic losses such that the needed facilities are actually 'paid for' in relatively short order even though they are not created " [135]

Given this goal, it might be argued that the sole basis of the compensation system should be to silence this costly opposition to the highway—to buy peace and quiet. Under such a system, however, people who were disposed to complain loudly, and who were able to use effective methods for making their complaints heard, would be favored over those of more placid disposition or less political skill Because people in essentially similar situations would not receive the same treatment this system would be considered unfair, and most people would agree that any system of compensation should be "fair," even though, as Prof. Frank Michelman of the Harvard Law School has pointed out,[136]

> conceptions of fairness . may be inescapably vague. Fairness is a subtle compound, whose presence in any given situation we can often sense (and even, perhaps, form a consensus about) but only through a mental chemistry hard to reconstruct except through impressionistic, almost conclusory discourse.

Another goal might be to keep the cost of administering a compensation program within reasonable limits, and to provide the compensation promptly and efficiently, so that the benefits received by dislocatees constitute the largest possible share of the compensation system.

A more detailed analysis of the proper goals of a compensation program is beyond the scope of this report, but for present purposes the goals of a compensation program might be assumed to include (1) restriction of payments to losses actually caused by the highway program, (2) elimination of complaints that would delay construction of the highway, (3) fair treatment of all classes of displacees, and (4) prompt and efficient administration of the compensation program. However, the final determination of goals of a compensation system, and of the losses to be compensated thereunder, must in the final analysis be a basic policy decision.

TENTATIVE RELATION OF SPECIFIC METHODS TO SPECIFIC LOSSES

After it has been decided which losses deserve compensation, the next step in the analysis of compensation techniques is to determine which techniques would appear to bear at least some tentative relationship to the appropriate losses, eliminating those techniques that would be unrelated to the losses sought to be compensated.

In this chapter the various losses outlined in Chapter Three are tentatively matched with the various techniques outlined in Chapter Five. This matching is merely illustrative of the type of process which, in much more detailed form, should take place at this stage of any analysis of potential compensation techniques.

Loss of Real Property

The loss of the real property *per se* is amenable to compensation either through an eminent domain proceeding or through provision of replacement housing.

Cost of Transferring Property to the State

The cost of transferring property to the state will be common to many dislocatees, and predictable in amount. The scheduled payment method, therefore, would be appropriate, but either an eminent domain or claims procedure might also be used

Loss of Equity in the Property Taken

The loss of equity in the property taken is susceptible to either separate valuation in the eminent domain proceeding or a claims procedure Scheduled payments would not be appropriate in light of the variability of this loss in incidence and amount.

Losses Due to Delay Between Announcement and Taking

The losses due to delay between announcement and taking can be avoided or reduced to some extent by advanced acquisition, hardship acquisition, and early appraisal. To the extent they cannot be avoided, their varying degree of incidence and size indicate that compensation under a claims procedure may be the most feasible method.

Moving Costs

The universal incidence and highly predictable nature of moving costs make compensation through scheduled payments the most appropriate method of compensation, although a claims procedure for special cases may be desirable.

Increased Cost of Replacement Housing

Increased cost of replacement housing might be reduced by the centralization of relocation facilities in one agency to handle all dislocation in one area, by provision of more lead time, by allowing holding-over, and by advisory assistance. To the extent it cannot be avoided by these methods, and to the extent these methods cannot be employed on a given project, the additional cost of replacement housing for landowners could be compensated through changes in the eminent domain process or through the provision of replacement housing. For tenants, some form of claims procedure probably would be necessary.

Incidental Costs of Acquiring Replacement Housing

The costs of appraisal, survey, title examination, closing costs, and increased financing charges may not arise if some method of substitute compensation is employed; if they do arise, the high incidence and predictability of amount indicate that a scheduled payments approach would

[135] *Hearings on Urban Highways Before the Senate Subcomm on Roads*, 90th Cong , 1st Sess , pt 1, at 180 (Nov 30, 1967)

[136] F Michelman, *Property, Utility, and Fairness Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV L REV 1165, 1249 (1967)

be feasible for all of these except increased financing charges. The costs of increased financing charges might be compensated by government loans or loan subsidies to the dislocatees at sub-market interest rates.

Searching for Replacement Housing

Again, the loss incurred by searching for replacement housing will not arise if replacement housing is provided. It might also be avoided to some extent by provision of adequate lead time and advisory assistance. To the extent it cannot be avoided, it seems best compensated by a claims procedure.

Loss of Employment or Increased Commuting Expenses

The loss of employment or increased commuting expenses might be avoided through substitute compensation or through advisory assistance to provide relocation near the old place of employment In addition, one of the best means of avoiding the unemployment of displaced workers is by insuring the successful relocation of local business in the community.

Disruption of Business and Personal Relations

The noneconomic losses of disruption of business and personal relations may be avoided if some method of substitute compensation is used, they might be alleviated through increased uniformity of practice or the use of a more or less formalized two-hearing procedure If these losses cannot be avoided, the only feasible method of compensation would be a claims procedure, because the nature and amount of the loss would vary widely in different cases

Disruption of the Quality of Life in the Area

The disruption of the quality of life in the area may be avoided with careful planning and additional lead time Route location procedures by which the highway designer becomes acquainted with the community's views on the importance of various educational, recreation, and commercial facilities can help avoid these losses. Where avoidance is impossible, some form of joint development appears to be the only feasible method of compensation.

OVER-ALL IMPACT OF VARIOUS COMPENSATION TECHNIQUES

An analysis of compensation techniques clearly cannot end with the determination of which techniques are likely to be best suited to compensate for which losses. By-products of each technique must be examined to determine its over-all impact. For example, is the technique so expensive that its cost outweighs its benefits? Will the technique cause new and different losses to occur? Will the technique operate in a manner consistent with the over-all goals of the compensation program?

This section of the report attempts to make a very tentative analysis of some of the beneficial or detrimental effects that can be anticipated from use of each of the techniques discussed in Chapter Five. Once again it should be noted that this analysis is merely illustrative of the type of more detailed analysis of beneficial and detrimental effects that should be undertaken in any detailed study of a compensation technique.

Methods of Monetary Compensation

Three broad methods of dispensing cash are discussed in Chapter Five: (1) eminent domain only; (2) eminent domain plus scheduled damages; and (3) eminent domain plus scheduled damages plus claims procedure.

Eminent Domain Procedures

Eminent domain procedures use the existing court system. The procedures of this system are standardized and relatively efficient and the cost of administering the system is spread largely among the entire population, rather than being added to the cost of the highway program. In addition, the familiarity of many people with existing eminent domain procedures reduces the problem of disseminating to the public information about techniques involving wholly new procedures, a difficulty that has proven a considerable problem in administering the present relocation services [137]

On the other hand, there are severe limitations on the extent to which eminent domain can be expanded to compensate for the more intangible losses. Judicial procedures cannot easily be adapted to innovative methods of settlement, as Prof. Michelman has suggested. [138]

> The imponderable and idiosyncratic nature of the losses involved, and the interminable wrangling over amounts which would result from imposing a legal requirement of "just compensation," furnish a classic instance in which compensation claims are defeated largely because of sheer impenetrability

The further the loss is removed from traditional concepts of property law the more difficult it is to adapt eminent domain techniques to the compensation of the loss.

For example, only "property owners" are normally parties to the eminent domain proceeding; tenants are not. But tenants often will be the greatest sufferers in mass urban condemnations. Expansion of the rights of tenants to require their inclusion in eminent domain proceedings would greatly complicate the procedures and reduce their advantage of simplicity. Therefore, few people would suggest expanding eminent domain to deal with the problems of nonowner displacees.

However, there has been substantial dissatisfaction with the "fair market value" standard used to value the owner's interest in property taken. This dissatisfaction has led to proposals for new standards of valuation.

Highest Reasonable Price.—The California standard of the "highest reasonable price" assumes the basic soundness of the fair market value standard and merely suggests that the landowner be given the benefit of the doubt (Many believe juries have been doing that for years.) This standard would make no basic change in current valuation procedures and probably would add little to total cost. The change in terminology might have beneficial effects on public relations.

Replacement Cost—It has been suggested that the compensation of homeowners in highway takings should be sufficient to allow them to acquire replacement property.

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[137] CONNECTICUT ADVISORY COMMITTEE TO THE U.S COMM ON CIVIL RIGHTS, REPORT ON CONNECTICUT FAMILY RELOCATION UNDER URBAN RENEWAL (1968); *see also* note 157 and note 158, *infra*.

[138] F. Michelman, *supra* note 136, at 1255.

For example, Governor (now Secretary of Transportation) Volpe in testifying before the Senate Subcommittee on Roads in 1968 suggested that the appraised valuation of the property of displaced persons "might be based on what is needed for them to acquire comparable and adequate accommodations elsewhere." [139]

The implementation of a replacement cost technique presents a number of problems. In the first place, if no comparable procedure is instituted for displaced tenants, the use of the replacement cost method would create an unfair distinction between owners and tenants. But to require the inclusion of tenants in eminent domain proceedings and the computation of an award to them based on the rental they will be forced to pay for replacement housing would so complicate the eminent domain proceedings that the harm caused by the delays might outweigh any benefits received.

Furthermore, the definition of replacement cost is hard to pin down. If replacement cost is considered to be the cost of obtaining comparable property, it is first necessary to define what is comparable property; and it is difficult to see how that definition should differ from that of the fair market value standard—if two pieces of property are comparable why should they not have the same market value?

The replacement cost concept creates difficulty because it necessitates consideration of the unique problems that each individual dislocatee may have in finding replacement property. Existing eminent domain procedures are highly impersonal—assigning the same value to property regardless of the age, race, or personal idiosyncrasies of the owner. If replacement cost varies depending on personal characteristics of the owner, however, it would be necessary to introduce evidence of these characteristics into the eminent domain proceedings, together with evidence of how these personal characteristics influence the housing market.

Because of these adverse incidental effects of the use of a replacement cost standard in eminent domain procedure it is probable that any attempts to provide replacement cost should be instituted through some type of claims procedure.

Nevertheless, it should be pointed out that the use of a "replacement cost" standard would have value for public relations purposes, and would encourage appraisers to give greater consideration to certain factors that might otherwise be given insufficient weight.

Upset Price —The major premise of the upset price doctrine is that there is a "normal market" for "decent, safe and sanitary housing," the behavior of which can be determined with precision. The second premise of the doctrine is that no forced sale should be held under other than normal market conditions

As has been seen,[140] property taken for public projects is often located in run-down areas, and it can be argued that the condition of such areas can be attributed to the government's failure to enforce codes and provide public services. To the extent that a "normal market" exists for housing without reference to the specific neighborhoods in which such property is located, and to the extent that a sale pursuant to an eminent domain proceeding is a forced sale, then the provision for an upset price has some logical basis.[141]

The "upset price" technique directs inquiry away from the question of how the market values what the condemnee has and toward the question of what the market will demand from the condemnee to restore him to what he should have had. Because "upset price" presupposes the existence of a "normal market" from which an upset price can be ascertained (the decent-safe-sanitary-housing market), such a system necessitates the formulation of appropriate rules for determining the normal market price of the property taken. If this formulation proves to be complex, the delay and administrative cost may outweigh the technique's advantages.

Another possible difficulty with the upset price system may be its impact on areas being considered as possible future highway corridors. The incentive to maintain property may disappear if the price paid for the property is the same whether it is in average or below-average condition, as it will be under any extrinsic valuation method, such as "upset price" and "replacement cost," in which the amount paid is determined not by the value of the thing taken but rather by the value of the thing to be acquired.

Separate Valuation of Interests.—The technique of separate valuation of interests may involve some serious detrimental by-products. The implementation of a system in which mortgages were compensated only at market value rather than at book value might make lenders unwilling to finance housing in areas under consideration as possible highway corridors. Those who were willing to finance housing might charge even higher interest and discount than they do now because of the risk that on condemnation they would receive only a portion of the book value of their interest. Thus, the over-all effect might be to punish the very low-income homeowners sought to be helped.

Eminent Domain plus Scheduled Damages

Adding to the eminent domain proceeding a statutory schedule that specifies the types of incidental losses that are compensable and the amount of compensation for each is advantageous insofar as it preserves a degree of simplicity. Although the use of an administrative agency to handle the payments would be required, it is likely that individual claims could be handled quickly; it would be relatively clear from the schedule which claims were compensable, and the schedule would provide for lump-sum payments without any necessity of detailed proof of loss. Under such a system only the exceptional case would require special attention.

The disadvantage of the scheduled damage technique is that it would necessarily exclude those categories of inci-

[139] *Hearings on Urban Highways Before the Senate Subcomm on Roads*, 90th Cong , 2d Sess , pt 2, at 247 (May 6, 1968)

[140] "Losses Resulting from the Necessity of Relocation" in Chap Three of this report

[141] It may also be noted that although Section 506(a) of the 1968 Federal-Aid Highway Act does not incorporate an upset price theory into the actual eminent domain proceedings, it does provide for additional payments of up to $5,000 where necessary to allow owner-occupants to acquire decent, safe, and sanitary replacement housing The ultimate relief to homeowners is thus similar to an upset price *See* 23 U S C § 506(a)

dental loss that cannot be predetermined in fixed dollar amounts. Even for the more common losses, by limiting recovery to a fixed amount regardless of the actual loss, this technique stops short of a complete effort to fully compensate the owner for losses he has suffered as a result of the public improvement. In addition, windfall payments for losses that were never incurred might result.

Eminent Domain plus Scheduled Damages plus Claims Procedure

The use of an independent procedure for hearing claims and awarding damages for provable losses resulting from the displacement but not covered by scheduled damages would avoid some of the disadvantages of the scheduled-damage system.

The major advantage of the claims procedure is that it provides an opportunity for the dislocatee to claim the full amount of his loss, rather than being limited to schedules that may be overly reminiscent of welfare payments.

The disadvantage of the system is its cost. Administrative costs would be increased, and the system would probably result in increased compensation payments. But these increased costs may be nominal because the claims procedure might be invoked only in extreme cases, and most ordinary losses will probably be covered by the statutory schedule.

In addition, the claims procedure presents a unique opportunity to discover what those affected by the highway feel to be their losses. This could be invaluable in restructuring the compensation system to meet the needs of those affected at the least cost to the public.

Methods of Nonmonetary Compensation

Uniformity and Centralization

Proposals for uniformity of practice and centralization of relocation facilities in a single area agency have been widely circulated. One advantage of these forms of "compensation" is that they are by and large costless. Where money is already being dispersed, it costs no more to disperse it more equally among people being affected in similar ways. Furthermore, it is possible that by coordinating efforts of many independent local agencies some overlap can be avoided so that even higher pay-outs can be sustained at present cost levels because of reduced administrative expenses.

However, it must be noted that the economics of scale so hoped for in any centralization may often be lost in a geometric growth of bureaucracy. In addition, centralization of efforts can mean loss of local participation and with it a growth of hostility toward highways as projects for outsiders controlled by outsiders. Any efforts toward uniformity and centralization must be undertaken with these dangers in mind.

To the extent that these dangers can be avoided, the advantages to the dislocatee are clear. A central goal of any compensation system is to soothe people's ill will toward the highway project, and few things breed ill will as rapidly as a feeling that not only is one not being given enough compensation for his losses but that someone else is getting more. Uniformity of practice will eliminate this. Two major possible benefits of centralization and coordination are (1) to the extent that dislocation causes hardships simply because those affected are not aware of available services, a single agency may provide an answer merely by being more visible so that more dislocatees will seek and find relocation assistance; and (2) once they find the single agency, it will be able to direct them to any other agency that may be able to deal with their specific problem—whether that problem is a direct result of the displacement or not.[142] In this way the highway authority could draw on the resources of specialized agencies to aid it in making displacees feel that the highway has brought with it benefits as well as difficulties.

Increased Lead Time, Advance Acquisition, and Holding Over

A number of advantages are to be gained by use of the techniques of increased lead time, advance acquisition, and holding over. First, they all allow more time for the displacee to solve his own problems. Many people may prefer, when their property must be taken, that the condemning authority simply give them enough notice of that fact and pay them early enough in the process to allow them to go out on their own and do the best they can with the funds they realize from the taking. Thus, a combination of early valuation, damages, and these devices might, for some, be the best solution. If that is true, the benefit to the highway authority is clear: it is relieved of much of the responsibility and cost of relocation.

Second, to the extent that the highway authority still must bear the burden of relocating those displaced, these techniques allow for a more orderly and deliberate relocation at lower economic and social costs.

The third major advantage of these devices is that they may allow the highway authority to secure title to the right-of-way at a lower cost due both to earlier acquisition in a period of rising land values and to acquisition of land prior to its improvement, thus, in many cases, avoiding the need for residential displacement.

Finally, these devices would remove the pressure of having to meet short deadlines, and this in turn might allow for more serene and satisfactory negotiations with the property owner, with the result that some of the psychological upsets of forced dislocation may be avoided.[143]

Some of these benefits may, however, be offset by certain disadvantages. Provision of more lead time may impose greater post-announcement, pre-taking losses in property value, unless combined with some form of early valuation. Perhaps a more serious difficulty is the problem that once the highway authority has acquired properties, it must manage them. This, of course, involves all of the usual problems associated with landlord-tenant relationships. Furthermore, once the authority's plans become known, individuals can be expected to begin vacating the property.[144] Whereas this has obvious benefits for relocation

[142] CONNECTICUT ADVISORY COMMITTEE, *supra* note 137

[143] DEPT. OF TRANSPORTATION, *supra* note 98, at 13–23, *see also* SHOUP AND MACK, ADVANCE LAND ACQUISITION BY LOCAL GOVERNMENT (HUD, 1968).

[144] DEPT OF TRANSPORTATION, *supra* note 98, at 4.

of those vacating the property, it leaves the authority holding vacant property, which will not generate taxes and which may increase costs of policing to avoid vandalism. Furthermore, the costs of carrying the property, including the cost of borrowed funds, must be borne at a time before the public project and the anticipated benefits from it have begun.

Finally, it is clear that the potential advantages of advance acquisition to the highway authority are the greatest in undeveloped suburban and urban fringe areas and in downtown areas where land uses are being upgraded or are rapidly changing.[145] But the greatest problems of relocation are in the stable and deteriorating sections of the inner city.

The Two-Hearing Procedure

The new federal "two-hearing" requirements established early in 1969 will require a hearing to be held before any commitment to a given route for the highway is made.[146] State highway departments objected to the new procedures The full scope of objections is well summarized in a statement by Ross J. Stapp, President of the American Association of State Highway Officials, at hearings held on the proposal[147] His most relevant objections for present purposes were that "a public hearing is not an appropriate . . forum nor an effective mechanism for making decisions";[148] that great delays would be caused by such a hearing requirement,[149] that the procedure for appeals to the Federal Highway Administrator would "destroy the state's prerogatives, responsibilities and control of their highway programs";[150] and, finally, that although such procedure might be useful in some situations (such as the construction of large urban highways), the regulations lack flexibility in making it applicable across the board to all federal-aid highway projects[151]

The problem most frequently raised was the increased cost that might be incurred due to delays caused by the two-hearing procedure. Frank A. Howard, Virginia Road Builders Association, noted that[152]

> The highway user is putting up money to build the roads today that they [*sic*] need today And any delay is depriving them of safer, more efficient, more economical personal travel, more economical efficient movement of goods and services Highways are also a vital part of our National Defense Program In addition there is the economical factor to consider—delays in constructing the needed highways hit the citizen right in the pocket book. About one in seven citizens in the United States makes his livelihood from the highway transportation and construction industry in one form or another

Some witnesses conceded that the new procedure would cause some initial delays[153] But others felt that over-all delay would be reduced, as Dennis Neuzil suggested:[154]

> The adoption of these regulations should help to reduce delay . and unnecessary controversy. . . Delay would be the fault of the highway department which fails to undertake its advance planning and preliminary project design and evaluation early enough to give adequate consideration to [social, economic and environmental factors] The highway department which takes the old "easy" approach of routing the highway through parkland or historical site, or bisecting a neighborhood should not be surprised that time-consuming controversy is generated

The National League of Cities and U.S. Conference of Mayors recognized both the need for increased community participation to minimize opposition to the highway and also the disadvantages of too-early announcement of the project·[155]

> Though consultation with affected interests in the community is vital in the early stages . , a full scale public hearing at a very early stage may have substantial adverse effects upon citizens in the proposed corridor area People will have difficulty transferring their property and may be reluctant to improve their property . until final decisions . are made. Real estate speculators may take advantage.
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> * * *
>
> It may be beneficial to use . . more informal procedures than public hearings in the early stages of corridor designation, provided there are firm assurances that all interested parties in the community will be given an opportunity to make their views known and have them considered by the state highway department

The two-hearing procedures may indirectly reduce compensation problems if they force the abandonment of highway projects in areas where relocation would be required. In any event, to the extent that they force examination of relocation problems at an early stage in highway planning they will be highly beneficial Once the decision on route location is made, however, the compensation problems will remain to be faced.

Local Appraisers

It is assumed that the use of local appraisers would increase the size of awards and improve the psychological impacts of condemnation; it is possible that their use could significantly reduce opposition to highways by giving the condemnee more reason to feel that his property has been fairly valued.

There is a serious question, however, whether significant numbers of local appraisers can feasibly be found or

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[145] *Id* at 14

[146] Fed Reg 727 (Jan 17, 1969), the regulations were originally proposed at 33 Fed Reg 207 (Oct 23, 1968)

[147] *Hearings, supra* note 106, at 346–57

[148] *Id* at 351

[149] *Id* at 350

[150] *Id* at 357

[151] *Id* at 349

[152] *Id* at 517 T H Bovard, American Right-of-Way Association, pointed out the conflict between the two-hearing concept—which prohibits any right-of-way acquisition until after public hearings are held—and the advance acquisition policy of the 1968 Highway Act He further asserted that there would be "added costs, frustrations, lost opportunities, etc due to delays in the right-of-way acquisition which must be paid by the property owners affected and the community, [and also] losses suffered by the public in the form of delayed user benefits as the result of delayed construction caused by debated right-of-way acquisition" He argued that once a citizen suspects his property will be taken by a highway propect, he becomes very anxious to get it over with as soon as possible, and that when the highway authority is prohibited from moving quickly to acquire the land after the project is announced much ill feeling and hostility can be expected from those who are required to sit and hold property that they know eventually will be taken Other speakers noted that the requirement of a hearing in advance of a final choice of a corridor will result in all of these adverse effects being felt not only in the area where the highway is ultimately built but also in all those areas under consideration as possible corridor locations

[153] *Id* at 423–24

[154] *Id* at 685–86

[155] *Id* at 429

trained, and whether local appraisers can be relied on to reflect "local advantage" value without unfairly overvaluing property because of their local bias

Early Appraisal

This device is attractive because it seems at first to be a simple solution to the problem of how to compensate post-announcement, pre-taking losses. However, difficulties in administration may make the device unworkable. Senate Bill 1 [156] directs that post-announcement decreases in value shall be "disregarded" in fixing the award, but gives no hint as to how an appraiser can look at a piece of property today and tell what it was worth a year or two years ago. Having the appraisal at an earlier date does not seem to be a feasible solution, because it could entail needless expense in appraising property in several alternative corridors.

Negotiation Practices

Disclosing the highway authority's appraisal before negotiation should increase public confidence in the good faith of the authority. It has the possible disadvantage, of course, that it could lead to substantially higher acquisition costs, although it is conceivable that this practice would lead to a reduction in over-all acquisition costs by promoting more settlements.

The proposal for a single firm and final offer, to be followed immediately by formal proceedings unless accepted, might eliminate the time delay and administrative costs that accompany prolonged haggling However, its lack of flexibility could seriously harm the public image of the highway authority and might force more acquisitions into court.

Advisory Assistance

Relocation advisory assistance is particularly valuable for minority-group and low-income residents. Low- or moderate-income displacees often have a limited knowledge about the housing market They also face restricted housing alternatives in urban areas caused both by shortages of decent housing within their price range and by racial discrimination in the sale and rental of private housing. Although advisory assistance does not solve the problem of limited housing alternatives for low- and moderate-income groups, it can aid the displaced in making rational choices among the housing alternatives available. Furthermore, expansion of the educative aspects of relocation advisory assistance can soften the adverse impact of forced relocation on the families and individuals involved. And, as is pointed out earlier, to the extent that advisory assistance is simply a centralized referral system, it allows the highway builder to "compensate" dislocatees through the use of nonhighway resources If, as a result of the dislocation, the dislocatee is made aware of benefits and services available to him to improve his general plight, he may begin to view the highway as a positive force

A serious disadvantage of advisory assistance is that it may be costly, and its cost may be for naught if dislocatees do not take advantage of its benefits There is some evidence that this may be the case. In one California project only 10 of 3,600 dislocated families were completely relocated through the efforts of a "widely publicized . . [attempt] to offer sincere and effective relocation assistance" at a cost of $90,000.[157] A District of Columbia urban renewal study found that despite a concerted effort to evoke interest in an assistance program, only 30 percent of the families living in the area were reached by one or more of the programs available.[158]

Providing Replacement Housing: Moving Existing Dwellings

As a method of voluntary compensation, relocation of the condemnee's home has certain advantages. It helps to minimize the public cost of providing replacement housing by using existing structures The major costs of this type of program are land acquisition and house-moving expenses. One proposed California project appears to have gained significant community support. In Watts, the route of the Los Angeles Century Freeway will displace 2,600 families. Many of these families live in single-family residences of which approximately half are owner-occupied and are a source of pride to their owners. The Freeway plans call for the relocation of these houses within the Watts area on vacant land made available by the Watts riots Such relocation will provide the incidental benefits of needed reinvestment in the community and of job training for those Watts residents hired to relocate their structures.[159]

One of the major requirements of any program to relocate acquired houses is the availability of undeveloped or underdeveloped land that can be used for relocation sites. Although civil disorders created such property in Watts, many urban areas—especially inner city areas—do not have such available land. In part, shortages of land in urban low-income areas may be one of the causes of the low- or moderate-income housing shortage, which in turn requires those planning an urban highway to find alternative housing for those it displaces.

However, even assuming the feasibility of such a project in terms of available land, relocating existing houses has other disadvantages that must be considered First, not all dwellings may be relocated. Many dwellings in urban-core areas are dilapidated and substandard and will not and should not withstand relocation. Second, a program of dwelling relocation presumes that the structures to be relocated will be moved to sites near their former location, inasmuch as costs of moving entire structures will probably preclude dispersal of acquired dwellings throughout an urban area [160] In some urban areas this would mean a perpetuation of racially segregated housing patterns, which is obviously not desirable and may even be constitutionally prohibited [161]

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[156] S 1, 91st Cong , 1st Sess (1969)

[157] DEPT OF TRANSPORTATION, *supra* note 96, at 109

[158] DIST OF COLUMBIA, *supra* note 121

[159] HIGHWAY RESEARCH BOARD, JOINT DEVELOPMENT AND MULTIPLE USE OF TRANSPORTATION RIGHTS-OF-WAY 68–73 (HRB Spec Report 104, 1969) See also the statement of Governor Reagan in *Hearings on Urban Highways Before the Senate Subcomm on Roads*, 90th Cong , 2d Sess , Pt 2, at 257 (May 6, 1968).

[160] For example, the proposed Illinois relocation statute provides that structures are to be relocated within one mile on either side of the expressway right-of-way 76th Gen Assem , House Bill 2416, *as amended* (1969).

[161] Gautreux v Chicago Housing Authority, 296 F Supp 907 (U S Dist Ct , Northern Ill , 1969).

There is a clear necessity to weigh the advantages and disadvantages of this method of compensation in light of the particular project inasmuch as the balance is likely to be quite different, depending on specific circumstances

Providing Replacement Housing
Securing Existing Dwellings

The approach of providing replacement housing by securing existing dwellings has many of the benefits of advisory assistance because its aim is essentially the same—to help those dislocated find new housing. It goes a step further to the extent that the highway authority provides existing housing by actually acquiring title to, or other appropriate interests in, property and then transferring it to the dislocatee

A major advantage of this technique is that the highway authority would be able to start operating in the private housing market long before individual dislocatees could, and without the financing problems that beset many people in the market. Thus, the authority should be able to secure a larger percentage of available housing for relocation purposes than could be secured through individual negotiations by those displaced. Furthermore, the highway authority might be able to operate in a wider market and at lower costs than minority group dislocatees. If housing were obtained throughout the urban area, such a system would have the incidental benefit of breaking down existing racial and ethnic patterns within our cities.

However, use of this technique means that highway funds may be tied up in unproductive uses for longer periods. Furthermore, this technique does nothing to increase the over-all supply of housing; it simply adds another bidder to what may be an already tight market. It also presents problems of maintaining any housing so acquired by the highway authority during the interim between purchase and disposal.

Finally, it may be difficult to predict what type of housing will be acceptable to the people being displaced. Many people may wish to move up to a better quality of housing, but the highway authority would be offering them only the equivalent of their former dwelling.

Providing Replacement Housing
Constructing New Housing

Providing replacement housing through the construction of new housing has the obvious advantage of increasing the over-all supply of housing, which in many areas is critically short. In his 1969 *Annual Report on Highway Relocation Assistance,* the Secretary of Transportation called for a redefinition of the relocation assistance problem. He concluded that, with the passage of the 1968 Highway Act, lack of authority and funds with which to compensate dislocatees no longer characterizes the relocation problem Instead, the Secretary found, the central problem is now how to equate relocation housing supply and demand in particular places and at specific times as highway projects proceeed.[162]

A recent paper noting that the Department of Housing and Urban Development has not cooperated closely with the Department of Transportation to assure effective highway planning suggests that the Department of Transportation take primary responsibility for the provision of new homes for those displaced by the highway.[163] The paper cites other instances in which federal agencies not directly involved in the housing area constructed housing where such projects were incident to powers granted the agencies involved.[164] The paper suggests that provision of alternate housing by the highway agency would avoid administrative entanglements and make the highway officials more responsible to the people they affect.

California has proposed legislation authorizing its highway agency to take primary responsibility for the provision of replacement housing. The legislation would authorize the Division of Highways to acquire and condemn vacant unoccupied property outside the freeway right-of-way and to contract with public and private entities for the construction, planning, financing, and management or sale of replacement housing for low-income individuals and families.[165]

Construction of replacement housing could be used as a lever to break down the patterns of racial segregation in the housing market of our urban areas, a technique that has often been advocated in urban renewal.[166] At least one recent case indicates that the building of low-income housing for minority groups solely in minority group areas is not constitutionally permissible.[167] The court's decree required that for every new unit built in a Negro neighborhood (25 percent or more Black residents), three units would have to be built in white neighborhoods Thus, any program of providing replacement housing for those displaced by highways may necessarily involve the highway program in disturbing the residence patterns of large urban areas.

Furthermore, although assumption of the major responsibility for providing replacement housing by the highway authority itself would avoid problems of inter-agency cooperation, it would involve the highway authority in a field in which it may have no experience, aptitude, or real interest The complex problems involved in a major rehousing program would be best solved by an agency primarily concerned with those problems.

One way in which the highway authority might help provide replacement housing is through the construction of new housing within the right-of-way itself as part of a joint development program designed to stimulate other local programs by which cities can meet some of the needs for better housing, parks, business and commercial re-

[162] Highway Research Board, Land Acquisition Memorandum 200 (Hwy Res Circular No. 95, Mar 1969)

[163] ABRAMS, THE ROLE AND RESPONSIBILITIES OF THE FEDERAL HIGHWAY SYSTEM IN BALTIMORE (Baltimore Urban Design Concept Team, 1967) *See also* Downs, *supra* note 68, at 354

[164] For example, the Department of the Interior built Boulder City, Nevada, to house its workers, Narrio, Tennessee, was constructed by the Tennessee Valley Authority, and Greenbelt, Maryland, and Greendale, Wisconsin, were planned and built by the Resettlement Administration ABRAMS, *supra* note 163, at 15

[165] *See* HIGHWAY RESEARCH BOARD, *supra* note 159, at 71

[166] *See, e g*, CONNECTICUT ADVISORY COMMITTEE, *supra* note 137, at 49

[167] Gautreux v Chicago Housing Authority, *supra* note 161

development, by combining them with planned freeway improvements.[168]

The joint development approach capitalizes on the economics of highway land acquisition to build new housing for the displaced at a minimum cost. The urban freeway generally requires approximately 40 percent of the city block width, yet the acquisition of such a corridor may require 80 percent of the total cost of the block, due in part to severance damage payments. Thus, the remainder of the block could be acquired for an additional 20 percent of the total block cost and provide land on which to build alternative housing for those displaced by the highway right-of-way. Furthermore, it is estimated that construction of replacement high-rise, air-conditioned structures in urban slum areas would require only one-third of the land area of that occupied by the prior slum dwelling. The remainder of the unused land in the corridor could be used for park, recreational, cultural, and commercial facilities.[169] Use of the air space above the freeway for low- and moderate-income housing has also been suggested, with persons displaced by the highway right-of-way to be given first option on such rental units.

Although several examples of joint development exist throughout the United States, in only one instance has the concept been applied to the housing problem on a large scale. The Washington Bridge Apartments, opened in 1963, stand athwart the Manhattan approaches to the George Washington Bridge in New York City.[170] Experience with this project indicates some of the problems of using air rights for relocation housing. Tenants as high as the fourteenth floor of the building have complained about fumes from the expressway below, and residents of the lower floors find the noise level irritating.[171] This example may be extreme, however, inasmuch as 12 lanes of traffic, carrying heavy loads throughout the day, pass under the three towers of the Washington Bridge Apartments.

As mentioned earlier, joint development may be unconstitutional if steps are not taken to avoid the perpetuation of racially segregated housing patterns.[172] Finally, unless highways are planned with reference to joint development opportunities, route location may preclude use of air rights or land adjacent to rights-of-way for alternative housing purposes. Routes adjacent to harbors, rivers, swamps, and undeveloped areas are not particularly conducive to joint development planning.[173]

Economic factors must also be considered in evaluating the potential of joint development programs for providing relocation housing. Discussions of the economics of joint development have centered around the use of air rights over highway rights-of-way. Estimates indicate the decking costs for a ten-story building constructed over an existing expressway may increase total construction costs by 5 or 6 percent. However, such costs can be reduced to approximately 3 percent by integrating the project into the initial freeway construction.[174] This added cost must, presumably, be offset by land acquisition savings in order for such a project to provide economical replacement housing for highway displacees. Highway decking costs range from $15 to $20 per square foot. Thus, unsubsidized private development of air rights for housing purposes is not economically feasible until adjacent land reaches a comparable cost.[175]

The legal complications involved in the use of joint development should also be noted. State statutes vary considerably and should be carefully scrutinized to determine whether existing law permits effective use of the joint development concept. One problem that ought to be reviewed carefully is whether the law in a given state permits excess taking in order to avoid the payment of severance damages.[176] Another problem that must be considered is whether the state may acquire a fee simple interest in the land on which a highway is built or may acquire only a highway easement. If the latter is the case, as was true in ten states in 1958, joint development of air rights and/or adjacent land would seem to be precluded inasmuch as a highway easement does not include air rights and inasmuch as a right limited to the acquisition of an easement for highway purposes could hardly be said to include the right to acquire land adjacent to the highway for nonhighway development.[177] Furthermore, in the absence of statutory authorization, it may be that a state or municipality does not have the power to allow private encroachment over public thoroughfares.[178] Unless changed by appropriate legislation, this legal inhibition would preclude private development of air rights for housing purposes. The authority of highway departments to resell or lease both air rights and property that are not necessary for the highway should be scrutinized. Some state legislation permits sale or lease of real estate not needed for highway purposes.[179]

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[168] DEPT OF TRANSPORTATION, *supra* note 96, at 148, *see also* Bureau of Public Roads, Interim Policy and Procedure Memorandum 21-19, 20-01 (Jan 17, 1969)

[169] DEPT OF TRANSPORTATION, *supra* note 96, at 7–9

[170] Other proposed applications of the joint development concept to provide relocation housing include a proposed project in New Bedford, Massachusetts, over local service rights-of-way and a small portion of Interstate 6 and a proposed project which would be built above the air rights to the Center Leg of the Inner Loop Freeway (Interstate 95) in the District of Columbia HIGHWAY RESEARCH BOARD, *supra* note 159, at 161–63

[171] *See also* COLONY, EXPRESSWAY TRAFFIC NOISE AND RESIDENTIAL PROPERTIES (Toledo Univ. Research Foundation, 1967). The New York City Air Pollution Control in 1964, studied the apartment complex and found the pollution level in the areas "undesirable," but "not dangerous" However, the Citizens for Clean Air, a private organization, said that the pollution rate of the apartment complex was double the normal rate BARTON-ASCHMAN ASSO, JOINT PROJECTS CONCEPT INTEGRATED TRANSPORTATION CORRIDORS 85–86 (1968).

[172] Gautreux v Chicago Housing Authority, *supra* note 161

[173] STEWART, MULTIPLE FREEWAY LAND DEVELOPMENT 217 (Hwy Res Record No 2, 1968)

[174] *Id*

[175] *Id*

[176] Snyder, *Validity of Excess Taking to Avoid Severance Damages*, 1965 HIGHWAY LAW COMMENT 1, 3 (1968), Note, 21 U PITT L REV 60 (1959), *see also* People v Lagiss, 223 Cal App 2d 23, 35 Cal Rptr 554 (1963), and People *ex rel* Department of Public Works v Superior Court of Merced Co, 436 P 2d 342 (1968) Comment, *Excess Condemnation in California—A Further Expansion of the Right to Take*, 20 HASTINGS L J 571 1969)

[177] HIGHWAY RESEARCH BOARD, *supra* note 159, at 134

[178] *See* Sloan v Greenville, 235 S C 277, 111 S E 2d 573, 76 A L R.2d 888 (1959)

[179] *See* OHIO REV. CODE ANN § 5501 162, N.J. REV STAT 46. 3–19, WISC STAT § 66 0408(3) The Ohio statute should be particularly examined as an excellent example of legislation authorizing use of unnecessary highway property for joint development purposes It was one of the first statutes to specifically provide for conveyance of estates above highway rights-of-way.

CHAPTER SEVEN

TESTING THE ALTERNATIVES

The analysis in the previous sections of this report demonstrates the following propositions:

1. A wide variety of losses is incurred as a consequence of residential displacement that might arguably deserve compensation.
2. A substantial number of new compensation techniques has been proposed to deal with losses that are not now compensated or that are not thought to be adequately compensated
3. Almost all of these new techniques have potential by-products that may be either detrimental or beneficial.

The choice of which losses to compensate and which techniques to use will be made ultimately through the democratic political process. Elected officials will weigh the facts presented to them by administrators and other experts, measure the strength of public opinion, and reach the result that they believe to be best.

The quality of the ultimate political decision, however, will depend greatly on the quality of information that goes in to make it. The attention given to the problems of residential displacement in the 1960's has resulted in a significant number of high-quality studies of the problem; but, when compared with the quality of information that backs up major governmental decisions in, for example, military affairs or the space program, the amount and quality of information available to government officials seeking to solve the problems of residential displacement are still very low.

Because of the large expenditures that go into the federal highway program, the large number of jobs that depend on it, and the great economic benefits it brings to the United States as a whole, substantial expenditures on research and development are clearly in order. This has been recognized by Section 307(a) of the Federal-Aid Highway Act, which authorizes the Secretary of Transportation to engage in research and authorizes each state to devote 1½ percent of its share of federal highway funds "for research and development necessary in connection with the planning, design, construction and maintenance of highways." [180]

The language of this statute clearly authorizes the use of federal research and development funds for studies and experimental programs for solving the residential displacement problem. As Governor (now Secretary) Volpe has pointed out, "One of the most serious problems encountered in planning and executing highway projects in urban areas, is the displacement of people, homes and businesses." [181]

The types of research programs that might be undertaken fall into two basic categories: laboratory simulation and field experimentation

Laboratory simulation consists of building models and, on the basis of experiments performed on those models, predicting what would happen in the real world. The advent of the computer has made it possible to use this technique to deal in a sophisticated manner with complex social and economic problems. A computer simulation of an event can take account of a vast number of variables and of their complex interrelationships.

It is apparent, however, that any simulation will be limited by the quality of information available to the model builder. Before the model can work, someone must give it the correct data. The nature of residential displacement problems, and the current state of the knowledge about them, make it difficult to provide the computer with the types of data that it needs to produce accurate results. No one is yet sure just what losses the dislocatees really feel. Furthermore, no one yet claims that the sciences of psychology and sociology are sufficiently developed to enable one to predict how dislocatees will react to different methods of dealing with such losses as are thought to exist. Even the purely economic impacts of techniques for dealing with displacement are affected by many unknown factors.

Some preliminary model building and statistical analyses have been attempted.[182] This type of research should be continued, not in the hope that it will immediately provide any ultimate answers, but because it is necessary if computer simulation is to be a valuable tool in the future

Laboratory simulation, however, is not the only way in which new techniques for dealing with problems of residential displacement can be tested. The U.S. federal system offers the opportunity for field experiments in which new techniques of compensation could actually be tried in a limited area under carefully controlled and observed conditions. The results of these experiments, if carefully measured and reported, would provide a real basis for determining the actual effect of various changes in compensation techniques.

A state highway department might conduct field experiments by selecting a particular segment of urban highway in which substantial residential displacement problems are expected and establishing special rules for compensating persons displaced by that segment of the highway. The

[180] 23 U S C § 307(c)

[181] *Hearings on Urban Highways Before the Senate Subcomm on Roads*, 90th Cong , 2d Sess , Pt 2, at 247 May 6, 1968)

[182] *See, e g* , COLONY, STUDY OF THE EFFECT, IF ANY, OF AN URBAN FREEWAY UPON RESIDENTIAL PROPERTIES CONTIGUOUS TO THE RIGHT-OF-WAY (Univ of Toledo, 1968), COLONY, *supra* note 171, LANSING, ET AL., NEW HOMES AND POOR PEOPLE (Univ of Mich , 1969), KEY, WHEN PEOPLE ARE FORCED TO MOVE (The Menninger Foundation, 1967), RIEDESAL ET AL , SOCIAL, ECONOMIC AND ENVIRONMENTAL IMPACT OF HIGHWAY TRANSPORTATION FACILITIES ON URBAN COMMUNITIES (Wash State Dept of Highways, 1968), HOUSING RELOCATION AND COMPENSATION RELATED TO THE INTERSTATE HIGHWAY SYSTEM (Maryland State Roads Comm'n, 1969)

operation of these rules would be carefully observed to determine their social and economic impact. The results of the experiment would then be evaluated by a group of experts and made available in the form of a published report.

There are no legal impediments to the use of governmental funds for this type of program. Such field experiments have been used in a number of recent programs by federal agencies. For example, under Operation Breakthrough the Department of Housing and Urban Development will finance the experimental development of low-cost housing at eight sites to be selected around the United States. In any event, experimental programs dealing with residential displacement would appear to be clearly authorized by Section 307(a) of the Federal-Aid Highway Act.

There would be no constitutional prohibition on the use of new techniques to deal with the residential displacement as long as the techniques did not reduce the amount paid to property owners below the constitutional standards, prior court decisions demonstrate that additional payments beyond the constitutionally required minimum may be paid to particular property owners without violating any constitutional standard [183] and without creating any claims on the part of the persons not engaged in the experimental program.[184]

In summary, therefore, it is recommended that research and demonstration funds authorized under Section 307(a) of the Federal-Aid Highway Act be used for two types of projects in order to test alternative methods of compensation to deal with residential displacement problems First, laboratory simulation studies should be developed using the best modern methods of computer analysis. These studies should attempt to predict the social and economic impact of various compensation techniques. Second, field experiments should be conducted in selected areas throughout the United States to determine the actual effects of various changes in compensation programs. The results of these experiments should be carefully analyzed and made available to a wide audience.

[183] *See* "Money Compensation" in Chap Two of this report
[184] *See* "Possible Taxpayer Challenges to Supplementary Compensation" in Chap Two of this report

CHAPTER EIGHT

CONCLUSION

The problems caused by residential displacement are extremely complex. There may be no single "solution," no one "right answer" to the dilemma posed by the displacement of large numbers of families and individuals by large-scale government highway projects in urban areas.

This report discusses the alternative methods that have been suggested for dealing with the residential displacement problems and proposes ways of testing these methods. Only through such tests will it be possible to move on to more refined, more subtle, and more sophisticated conclusions about the compensation of persons displaced by highway projects.

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